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IN THE

Supreme Court of the United States

October Term, 1969

No. 343

BOSTON AND MAINE RAILROAD, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees,

and

BOSTON AND MAINE CORPORATION,

Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT

BOSTON AND MAINE CORPORATION
RICHARD JOYCE SMITH, *Trustee of The New York, New Haven & Hartford Railroad Company*

THE LONG ISLAND RAILROAD COMPANY
CERTAIN CLASS II, TERMINAL AND SWITCHING RAILROADS

CARL E. NEWTON, ESQ.
M. LAUCK WALTON, ESQ.
2 Wall Street
New York, New York 10005
Attorneys for Appellants

Of Counsel:

GEORGE M. ONKEN, ESQ.
RICHARD H. STOKES, ESQ.
GRANVILLE WHITTLESEY, JR., ESQ.
DAVID G. SCANNELL, ESQ.
J. PETER COLL, JR., ESQ.

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Appellants [1] appeal from the United States District Court for the District of Massachusetts after dismissal of con-

[1] Boston and Maine Corporation, Richard Joyce Smith, Trustee of the New York, New Haven and Hartford Railroad Company, The Long Island Railroad Company, and Certain Class II, Terminal and Switching Railroads: The Ahnapee & Western Ry. Co.; Greenville & Northern Ry. Co.; Lake Erie, Franklin & Clarion R. R.

(footnote continued on next page)

solidated actions which sought to set aside an order of the Interstate Commerce Commission. The appellants, pursuant to United States Supreme Court Rules 13(2) and 15, submit this statement to show that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment dismissing the complaints and should exercise such jurisdiction in this case.

(footnote continued from previous page)

Co.; McCloud River R. R. Co.; St. Johnsbury & Lamoille County R. R. Co.; The San Luis Central R. R. Co.; Tennessee, Alabama & Georgia Ry. Co.; Arcade & Attica Railroad Corp.; Belfast & Moosehead Lake R. R. Co.; Bonhomie & Hattiesburg Southern R. R. Co.; Chicago, West Pullman & Southern R. R. Co.; Claremont & Concord Ry. Co.; Clarendon & Pittsford R. R. Co.; Coudersport & Port Alleghany R. R. Co.; Dansville & Mount Morris R. R. Co.; East Tennessee & Western No. Carolina R. R. Co.; Fernwood, Columbia & Gulf R. R. Co.; Grafton & Upton R. R. Co.; Hoosac Tunnel & Wilmington R. R. Co.; Montpelier & Barre R. R. Co.; Moscow, Camden & San Augustine R. R. Co.; Trona Ry. Co.; and Virginia Blue Ridge Ry. Co.

Intervenors in support of the United States of America and the Interstate Commerce Commission include Chicago, Burlington & Quincy Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago & North Western Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Delaware and Hudson Railroad Corporation; Erie Lackawanna Railroad Company; Great Northern Railway Company; Gulf, Mobile & Ohio Railroad Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; Louisville and Nashville Railroad Company; Missouri Pacific Railroad Company; Norfolk and Western Railway Company; Northern Pacific Railway Company; The Pennsylvania New York Central Transportation Company; Reading Company; The St. Louis-San Francisco Railway; Seaboard Coast Line Railroad Company; Soo Line Railroad Company; Southern Pacific Company; Southern Railway Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; Union Pacific Railroad Company; and Western Maryland Railway Company.

OPINIONS BELOW

These are consolidated actions brought to set aside and annul an order of the Interstate Commerce Commission (the "Commission").

Boston and Maine Railroad, et al., v. *United States, et al.*, Civil Action No. 56-1004-G, was brought to review an order of the Commission in ICC Docket 31358 dated October 17, 1955. The Recommended Report of the examiner in ICC Docket 31358 is set forth as Appendix A hereto, and the October 17, 1955 decision of the Commission reported in 297 I. C. C. at page 291, is set forth as Appendix B hereto. The first decision of the district court, reported in 162 F. Supp. at page 289, was rendered May 5, 1958 and is set forth as Appendix C hereto.

The 1958 decision of the court below was appealed to this Court in Docket No. 310, but the appeal was dismissed as premature in view of the decision of the court below that the proceedings should be remanded to the Commission for further consideration. This Court's *per curiam* decision expressly reserved decision on the question of the Commission's adjudicatory jurisdiction. *Boston & Maine Railroad* v. *United States*, 358 U. S. 68, 72 (1958).

On remand, the Commission heard ICC Docket 31358 on a consolidated basis with Docket 33145 which was instituted in 1959, and, after its institution in 1964, on a consolidated basis with Docket 34405. After an examiner's Recommended Report (set forth as Appendix D hereto), the Commission rendered its decision in said dockets on January 17, 1968. This decision is reported in 332 I. C. C. at page 176 and is set forth as Appendix E hereto.

The interlocutory order of the Commission dated September 5, 1962, which denied petitions of Boston and Maine and New Haven dated February 6, 1960 and April 15, 1960 and upheld the propriety of the removal and substitution of

hearing examiners in the subject proceedings, is set forth as Appendix G hereto.

Boston and Maine Corp. v. *United States, et al.,* Civil Action No. 68-79-G, was brought in the court below to set aside and annul the 1968 Commission order in ICC Dockets 31358 and 33145.* The complaint in the 1956 action, Civil Action No. 56-1004-G, was amended to include an attack on the 1968 order. The actions were consolidated by order dated June 14, 1968. The decision of the District Court, reported in 297 F. Supp. at page 615, was rendered March 18, 1969 and is set forth as Appendix F hereto.

JURISDICTION

The appeal herein is from final and interlocutory judgments made and entered in the United States District Court for the District of Massachusetts by three-judge courts, specially constituted under 28 U. S. C. §§1336, 1398, 2284, 2321-2325; 5 U. S. C. §§701-706 and 49 U. S. C. §17(9), upon the plaintiffs' application for a permanent injunction to restrain the enforcement, operation, or execution of the Interstate Commerce Commission orders in *Chicago, Burlingon & Quincy R. Co., et al.,* v. *New York, Susquehanna & Western Railroad Co., et al.,* Docket No. 31358, *et al.,* 297 I. C. C. 291 (1955), and 332 I. C. C. 176 (1968). The final judgment appealed from was made and entered on March 20, 1969. Notice of Appeal was filed in the United States District Court for the District of Massachusetts on May 16, 1969.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of by the provisions of 28 U. S. C. §§1253 and 2101(b).

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* ICC Docket 34405 was dismissed by the Commission in its order dated January 17, 1968 "except to the extent to which the relief sought has been granted by order in Docket No. 33145 . . . ." 332 I. C. C., at 259, Appendix E hereto, p. E84.

The following decisions are believed to sustain such jurisdiction in this case: *Frozen Food Express* v. *United States,* 351 U. S. 40 (1956); *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515 (1946); *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U. S. 236 (1945); *United States* v. *Capitol Transit Co.,* 325 U. S. 357 (1945); *Hudson & Manhattan Railroad Co.* v. *United States,* 313 U. S. 98 (1941); *Chesapeake & Ohio Railway Co.* v. *United States,* 283 U. S. 35 (1931); *Baltimore & Ohio Railroad Co.* v. *United States,* 277 U. S. 291 (1928).

STATUTES INVOLVED

Sections 1(4), (10), (11), (14)(a), 13(1), 15(2), and 16(1) of the Interstate Commerce Act, as amended (49 U. S. C. §§1(4), (10), (11), (14)(a), 13(1), 15(2), and 16(1)) and Sections 2(c)-(d), 4(c), 5(c), 7(a), 7(c) and 11 of the Administrative Procedure Act (49 U. S. C. §§ 551 (4)-(7), 553(d), 554(d), 556(b), 556(d) and 3105) are set forth in Appendix H hereto.

QUESTIONS PRESENTED

(All references to the Act and to sections (§§) in this Jurisdictional Statement are to the Interstate Commerce Act, unless otherwise noted.)

1. Does the Interstate Commerce Commission have jurisdiction, whether under §1(14)(a), §1(11) or otherwise, to adjudicate claims for car hire charges for past periods?

2. Was it unlawful for the Commission, in its adjudication of claims for car hire charges for the period August 1953 to August 1969, and in its regulation of car hire charges on and after August 1, 1969, to include in the "costs" to be repaid to owners by means of that charge

substantial amounts of money which the uncontradicted evidence of record shows were never expended by owners?

3. Did the Commission, in its adjudication of claims for car-hire charges for the period August 1953 to August 1969, improperly require all such charges to be computed solely on the basis of time, in direct contradiction of its own finding that

> "... reasonable compensation to car owners requires that the ownership costs be distributed among and borne equitably by all railroads making use of such cars in just proportion to the amount of use, [and] that the use made of cars must be measured by both the length of time cars are held and the amount of activity to which they are subjected ...."?

4. Did the Commission in Docket 33145, in attempting to adjust the rate of return cost element of its car-hire charges for the effects of inflation, improperly rely on an index which records the purchase price of freight cars rather than on an index which measures the loss in purchasing power of the dollar?

5. Did the Commission, in its adjudication of claims for car-hire charges for the period August 1953 to August 1969, improperly rely on the use of industry-wide average costs rather than on the costs of the individual complainants and defendants?

6. Is there a zone or range of reasonableness within which proper car hire charges may fall, and, if so, must the Commission, in passing upon the claims for car-hire charges for the period August 1953 to August 1969, make findings as to whether the rates offered by the appellant car users are within such zone of reasonableness?

7. Did the removal and substitution of hearing examiners by the Commission, and the refusal of the Commission and the court below to provide appellants with requested information thereon, particularly with reference to the Commission's compliance or non-compliance with the requirement of Section 11 of the Administrative Procedure Act concerning rotation of hearing examiners, constitute reversible error?

STATEMENT OF THE CASE

The Judgment Below

The final judgment appealed from, entered in consolidated civil actions brought by appellants and others as plaintiffs against the United States and the Interstate Commerce Commission, dismissed the complaints herein which had sought to set aside the Commission order entered pursuant to proceedings had after the remand of the court below in Civil Action No. 56-1004-M.* A prior appeal to this Court in Civil Action No. 56-1004-M was dismissed as premature by this Court in a *per curiam* decision in which it expressly reserved decision on the question of the Commission's jurisdiction to adjudicate past claims for car-hire. *Boston and Maine Railroad* v. *United States,* 358 U. S. 68 (1958).

These plaintiffs appeal from the decisions of the court below rendered April 25, 1958 and March 18, 1969 insofar as that court adjudged: (1) that the Commission has jurisdiction to adjudicate claims for car-hire for the period August 1953 to August 1969; (2) that the Commission, in adjudicating such claims and also in regulating car-hire on and after August 1, 1969, committed no error by including, in the car ownership costs for which freight car owners are to receive compensation, substantial amounts

* Civil Action No. 56-1004-M was redesignated Civil Action No. 56-1004-G by order of the court below dated March 27, 1968.

which admittedly were unsupported by any evidence of record and which were affirmatively shown not to have been spent by car owners; (3) that in adjudicating claims for car-hire for the period August 1953 to August 1969 the Commission properly required all such car-hire charges to be calculated solely on the basis of the amount of time foreign cars spend on a user's lines, rather than on the basis of both time and the amount of use made of the cars, *i.e.*, a combined time/mileage basis; (4) that there was no error in the Commission's use of its Index of Freight Car Costs, Account No. 53, as a guide for calculating loss of purchasing power by reason of inflation; (5) that in adjudicating claims for car-hire for the period August 1953 to August 1969 the Commission properly relied on the average costs of all car owners rather than on the actual costs of complainant car owners; (6) that in adjudicating such claims the Commission properly held that there was no zone of reasonableness for car-hire charges and properly refused to determine whether or not the car-hire rates offered by appellants herein (defendants in ICC Docket 31358) were within "any . . . reasonable scope or range of rates"; and (7) that the Commission did not err in its removal and substitution of hearing examiners, or in its refusal to provide appellants information by which the extent of its compliance with the Administrative Procedure Act could be ascertained.

These plaintiffs also appeal the order of the court below dated October 22, 1968, to the extent that it sustained objections to appellants' request for admissions of fact concerning the Commission's assignment and re-assignment of hearing examiners in the subject proceedings.

Background of Litigation

The Commission order relates to certain "per diem" charges. "Per diem" has become a generic term for freight car rental, or "car-hire". It may refer to any rental charge, whether per day, per mile, or per load, and even to

combinations of such methods of charging for the rental of freight cars. All but one of the nation's Class I railroads own freight cars, and these cars must, by law, be freely exchanged in through transportation. Railroad-owned freight cars are on the lines of railroads other than their owners for hundreds of millions of car-days each year.

The Commission order appealed from determines what are allegedly reasonable car-hire charges for the period 1953 through 1965, approves a method for calculating allegedly reasonable car-hire for "past" years after 1965, and establishes an entirely different system of car-hire to be used in "future" years. This order, and its effect, is fully comprehensible only in the light of the controversy and the context in which it was made.

Rates Fixed Under Industry Procedures

Under §1(14)(a) or predecessor sections of the Act, the Commission has had the regulatory power to establish by rule the amount of rental "to be paid" for the use of cars of other roads since 1917. The Commission, prior to its order herein, has never successfully exercised that power. The Commission once attempted, in 1947, to exercise its power to regulate car-hire, but the purported regulation was enjoined and set aside on the ground that the Commission had relied on improper criteria in establishing the rental rate.*

The fixing of car-hire has thus been left to agreement among the carriers, acting in recent years through the Association of American Railroads (hereinafter "AAR"). Until about 1946** agreement among all carriers was obtained without serious dissent.

From November 1, 1920 to February 1, 1945, the car-hire rate was $1.00 per car per day. During the period 1945-1947 the rate rose to $1.15, $1.25 and then to $1.50.

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* *Palmer* v. *United States*, 75 F. Supp. 63 (D. D. C. 1947).

** As to the earlier period, see Mr. Justice Stone's dissent in *Chicago, R. I. & Pac. Ry. Co.* v. *United States*, 284 U. S. 80 (1931).

Petitions that the Commission establish a car-hire charge by rule under §1(14)(a) were filed by some short lines and other carriers during that period. The Commission suggested certain modifications of formulae used by the industry to fix car-hire charges, but found the charges just and reasonable and dismissed the complaint.* After 1947, there were successive increases to $1.75 in 1949, to $2.00 in 1950, and to $2.40 on August 1, 1953—a rate of acceleration so much faster than the post-war increases in freight rates (tariffs) allowed by the Commission that it nullified all their benefit as to roads like New Haven, Boston and Maine and Long Island.

The increases to $2.00 and $2.40 were fixed and put into effect under industry procedures set forth in an agreement among some five hundred railroads dated April 1, 1950 known as Agreement No. 7. Agreement No. 7 was approved by the Commission in February 1950 under §5a of the Act (known as the Bulwinkle Act, 49 U. S. C. §5b). *Section 5a Application No. 7, Association of American Railroads Per Diem, Mileage, Demurrage and Storage—Agreement*, 277 I. C. C. 413 (1950). The earlier $1.75 charge, fixed under a limited predecessor agreement, was adopted and continued pursuant to the procedures set forth in Agreement No. 7 (Art. IX).

Both under Agreement No. 7 and its predecessor, final action on the above-mentioned increases was determined by industry vote. This vote is weighted heavily in favor of the large car-owning roads in that each road has as many votes as it owns cars (Art. IV of Agreement No. 7).

Railroads acquire freight cars primarily to meet the demands of shippers on their lines (R.** 842, 55, 576). The

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* *Alabama, T. & N. R. R.* v. *Aberdeen & R. R. R.*, 274 I. C. C. 383, at 384, 399 (1949).

** R. indicates the transcript before the Commission prior to the reopening of the proceedings.

appellants are "terminal" railroads serving densely populated areas which consume more freight than they originate. These roads necessarily send back substantial numbers of empty foreign cars, because they have more foreign cars available for loading than they have originating freight. Such roads own relatively few freight cars and, indeed, appellant Long Island owns none. In contrast, the great majority of the freight cars are owned by roads which originate more traffic than they terminate. These roads are creditors on settlement of net car-hire accounts ("net creditors") while the terminating roads are generally "net debtors" on the settlement of their car-hire accounts.

Since at least 1946, majority voting control of the car-hire charge has been vested in a relatively small group of large car-owning railroads. For example, in 1952, 23 railroads (most of them complainants or intervenors in support of complainants before the Commission) owned 1,121,225 of the total 1,776,853 freight cars owned by Class I railroads (Ex. 14, R. 333, 863-4), and thus had over 63% of the total votes. The possession of this power by the per diem net creditor roads, coupled with the financial inducement to exercise it, enabled the adoption by majority car-owning vote of the successive proposals for increases in the per diem charge (R. 862-4, 866-7).

Less than four months after the Commission in July 1949 dismissed the short lines' petition for Commission regulatory action, the increase to $1.75 was made effective by action of the large car-owning roads (R. 245). To support this increase and the succeeding increases to $2.00 and $2.40, further successive changes were made in the formula (R. 91, 93-4, and fn. p. 12, *infra*), in each case providing support for a greater increase than would have emerged from application of the previous formula to the "cost" figures of the latest available year.* Pro-

* See initial Commission Report (297 I. C. C., 291, at 305-6, Appendix B, p. B27-B29) and fn. p. 12, *infra*.

tests by terminal roads to the AAR (R. 874-5, 877-9) were rejected or ignored (R. 251-2, 878-9, 889-91).

Until 1951 the railroads generally, signers and non-signers of Agreement No. 7 alike, settled with one another at the rates adopted or determined thereunder. In March 1951, however, the New York, Susquehanna & Western Railroad (which was not a party to Agreement No. 7) served notice that it would no longer pay the $1.75 per diem charge then in effect (pp. 23-24 of Ex. 53; R. 875-7 and R. 882). Instead, it offered to settle its per diem accounts thenceforth on a differently calculated basis, reflecting the cost of the cars in the individual ownership of each road (R. 879-882, 902-8). The Boston and Maine and four other roads accepted the Susquehanna's offer (R. 882-3, 954).

All of the large car-owning roads rejected the offer (R. 883). Virtually all of them also refused or ignored the Susquehanna's subsequent offers to negotiate individual bases of settlement with each road (R. 890) and demanded that the Susquehanna pay the uniform industry-fixed charge, variously terming it "the established rate," "the going rate," "the rate fixed by the AAR" (R. 883).

To support the increase to $2.40, a further change was made in the method used by the AAR in calculating the rate. This accounting change alone added more than $130,000,000 per year to the "costs" reflected in the per diem charge.* Eight roads which were subscribers to Agreement No. 7 refused to pay this increase, either withdrawing under Article X or exercising the "right to take independent action" under Article XII. These roads offered to continue to pay approximately $2.00 per day in final settlement of all car rentals.

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* R. 173, 96-7; sheet No. 4 of Ex. 4, R. 69, 219: The difference between lines 13 and 3 ($4,170,742,649) was added to the depreciation base. At the depreciation rate in effect for that year of 3.12% annually (*idem.*, line 20), this added $130,127,170 per year.

As Susquehanna had done, Boston and Maine and New Haven offered to agree on rental charges with each road individually. The increase to $2.40 was made effective by the AAR on August 1, 1953 (R. 245). The roads which replied declined to enter into any arrangement other than one at $2.40 (R. 400). Boston and Maine and New Haven then made what was thought to be "a general generous compromise offer" (R. 400-4, 420-1, 352-5, 409, 422), but the complaint before the Commission in ICC Docket 31358 followed almost at once, on September 21, 1953. The Susquehanna and seven of the non-assenting roads were defendants and the remaining dissenter, The New Jersey and New York, was added by subsequent amendment.

Docket 31358—The Commission Proceedings

That complaint alleged that, to the extent that the payments tendered and offered by the nine defendant roads in settlement of their car-hire accounts were less than the uniform industry-fixed charges, such payments, tenders and offers, "are and would be unjust, unreasonable and non-compensatory, in violation of Paragraphs (4), (10) and (11) of Section 1 of the Act."

The complainants did not seek money damages; as relief they asked that the Commission "find and declare" that the $1.75, $2.00 and $2.40 per diem charges were "during the periods in which these rates were effective . . . just, reasonable, and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers."

In their principal brief to the Commission in 1954 the complainants disclaimed any intention to invoke the Commission's regulatory power to establish car-hire charges under §1(14)(a). As the Commission said in its report, "Such action . . . would render the present procedure for

dealing with per diem charges inoperative." Instead, they expressly asked "that after settling the present controversy by appropriate findings the Commission should release the subject matter to the industry for private handling" under the procedures of Agreement No. 7, stating that the Commission findings sought by complainants

> "will be sufficient and effective as the basis for settling outstanding per diem balances and for assuring observance of whatever may be the established rate in the future." *

The Commission granted the relief prayed on October 17, 1955. Appellants decried this decision as a mere rubber stamp approval of the industry procedures and filed an action to set aside the decision.

The Commission Reversed

In its 1958 decision, the court below held, with one judge dissenting, that the Commission (under §§1(11), 13(1) and 16(1) had jurisdiction to determine whether and to what extent the rental prices fixed by collective industry action exceeded the maximum of what is reasonable, and to award recoupment of any such excess to protesting roads—the latter having acted at their peril in failing to pay the collectively-fixed prices in the first instance, however unreasonable. The district court, nevertheless, remanded the matter to the Commission for further proceedings on the ground that the Commission had not given sufficient consideration to plans submitted for reflecting in the car hire charge the use made of the cars, by requiring payment on the basis of mileage as well as on the basis of time. In *dicta*, the court also expressed considerable doubt as to the Commission's cost calculations.

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* Par. 40 of the 1956 complaint in Civil Action No. 56-1004-M admitted by answer of intervening defendants (par. 25).

Appeals to This Court Held Premature

An appeal in 1958 by plaintiffs below to this Court in Docket No. 310 sought a reversal on the ground, *inter alia,* that the Commission did not have jurisdiction to adjudicate per diem for the past. A cross appeal sought reversal of the court below on the mileage point, and reinstatement of the Commission decision. Both appeals were dismissed as premature in view of the district court remand and the Commission's statement that it was willing to proceed in accordance with the remand. In dismissing the appeals this Court stated that its dismissal was

> "without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings." 358 U. S. at 72.

Docket 31358 Reopened by ICC

On February 19, 1959, complainants in ICC Docket 31358 petitioned the Commission to reopen that proceeding. On March 24, 1959, the Commission granted the petition.

On April 21, 1959, the Boston and Maine, the New Haven, and the New Jersey and New York filed a motion to dismiss the complaint, to vacate the Commission's order of March 24, 1959, and for other relief. This motion also petitioned the Commission to require each complainant to "allege the specific amount of monetary damage which it individually claims to have been caused to it by each of these defendants . . ."; and that each complainant be required to establish its own individual costs of ownership of cars used by each defendant. The motion also prayed that the Commission direct that the controlling issue in the proceedings be whether defendants' car hire payments to complainants were below the *minimum* of reasonable compensation. Finally, the motion prayed that the Commission institute both a proceeding under Section 1(14)(a) of the Interstate Commerce Act for determination of future per diem charges,

and, as well, an investigative proceeding pursuant to Section 20 of the Interstate Commerce Act for the purpose of determining car ownership costs.

Complainants' reply of April 30, 1959, opposed all of the relief sought by defendants. The Commission, on May 14, 1959, reserved decision as to initiating proceedings under Section 1(14)(a) and Section 20, and denied all the other motions.

On July 24, 1959, the Commission granted those parts of the motion of April 21, 1959 which had not been denied on May 14, 1959. The Commission ordered that prescriptive action be taken under Section 20 of the Interstate Commerce Act for the purpose of gathering statistics and information on car ownership costs. The Commission also initiated a new proceeding, *Railroad Freight Car Per Diem Charges*, Docket 33145, under Section 1(14)(a). The Section 1(14)(a) proceeding was denominated an "investigation rulemaking proceeding" and was ordered heard "on a consolidated record" with Docket 31358.

Removal of the Hearing Examiner by ICC

At a pre-hearing conference held on September 29, 1959, Hearing Examiner Mittelbronn, after considering the issues to be heard and the data required for their resolution, ruled that certain accounting forms would be served on all 564 railroad respondents in Docket 33145. He assured the parties that the Commission would order such service (R2* 90-91), and that all necessary forms would be prescribed (R2 84-85).

Thereafter Division 2 of the Commission promulgated two orders dated November 25, 1959 which prescribed certain accounting forms but omitted several of the agreed upon forms. One of those orders did not provide for

* R2 indicates the Transcript before the Commission after the reopening of proceedings.

service upon all respondents. Appellants considered such service a prerequisite for the validity of these proceedings under Section 4 of the Administrative Procedure Act, 5 U. S. C. §553.

Upon learning of the issuance of the orders of November 25, 1959 Boston and Maine and New Haven commenced preparation of a petition for reconsideration and modification of the orders. In the course of the preparation of the petition, early in December 1959, Carl E. Newton, counsel for Boston and Maine and New Haven, telephoned the hearing examiner to request that copies of the orders be served upon counsel (as he had understood the examiner to have assured all counsel they would be), and to protest the apparent breach of understanding concerning the nature and service of the forms. At that time counsel was informed (1) that the examiner had protested the same defects without result and had gone so far as to inform Stephen A. Aplin, Director of the Commission's Bureau of Rates and Practices, that he did not wish to be associated with the proceeding if these orders were not corrected, and (2) *that these proceedings had been reassigned to some other hearing examiner.* This statement was made prior to January 1, 1960. Consequently the petition was expanded to include a prayer "that the Commission cause the order, directive, assignment or other procedure assigning a hearing examiner other than the originally assigned hearing examiner to the proceedings herein to be cancelled and vacated, and the originally assigned hearing examiner to be reassigned to these proceedings." This petition was served and filed on December 24, 1959 and followed similar petitions filed by the Ahnapee & Western Railway Company and other respondents.

Subsequently and on or before January 7, 1960, Division 2 corrected all of the defects in the orders of November 25, 1959 of which we (and the hearing examiner) had complained, by ordering service of the proper forms on all

parties. No action was taken at that time in regard to the reported replacement of the examiner.

There followed a period of six weeks during which the Commission was silent as to the prayers of petitioners directed to the assignment of the examiner. Beginning February 2, 1960 petitioners attempted unsuccessfully to arrange a meeting with Chairman Winchell concerning this matter, but were unable to gain any further information concerning the disposition of their prayer other than that it was under consideration and would be acted upon. As a result it was necessary for petitioners to file a petition for reconsideration and modification of the order of Division 2 dated January 7, 1960, which petition repeated the prayer of the petition of December 24, 1959 concerning the hearing examiner's removal. It further requested that the Commission make available and forward to petitioners certified copies of any documents evidencing facts pertinent to his removal. That petition was served and filed on February 6, 1960.

On February 15, 1960 orders were issued by the Commission 1) denying the petition of New Haven and Boston and Maine, dated December 24, 1959, 2) relieving Hearing Examiner Mittelbronn and 3) reassigning responsibility for the conduct of hearings to another examiner. These orders were supported only by the finding (on no evidence available to the parties and contrary to counsel's understanding of the facts) that Examiner Mittelbronn "of his own volition" had requested to be relieved on September 14, 1959. Thus the record is clear that the Commission did not relieve Examiner Mittelbronn until over five months after his protestations as to the Commission's irregular and unlawful procedures, and five weeks after the correction of all the defects of which the examiner had complained.

In an unsuccessful attempt to resolve the objections to the substitution of hearing examiners, Boston and Maine

and New Haven even expressed a willingness that the hearing examiner originally assigned to Docket 31358 in 1953, Examiner Hosmer, be reassigned and offered to waive all procedural objections in that event.

A further petition for reconsideration and modification of the orders of February 15, 1960 was filed on April 15, 1960. In a supplement to that petition, also served on April 15, 1960, appellants Boston and Maine and New Haven sought

> "(1) The assignment list of Commission hearing examiners available and qualified for assignment to proceedings in Docket Nos. 31358 and 33145, arranged in the order of their availability for assignment 'in rotation' (pursuant to Section 11 of the Administrative Procedure Act [5 U. S. C. §3105]) which was in effect as of September 29, 1959, and any and all subsequent lists made effective after that date.
>
> "(2) Copies of all orders or other documents assigning hearing examiners appearing on the assignment list or lists described above which have been made between the dates of September 29, 1959 and February 29, 1960."

These requests were made so as to enable appellants herein to have a provable record of pertinent facts concerning the assignment of a new hearing examiner to the subject proceedings.

By order dated September 5, 1962 the petitions dated February 6 and April 15, 1960 were in all relevant respects denied. This order and the opinion of the Commission are set forth as Appendix G hereto.

Amendments to ICC Complaints

On June 17, 1959, complainants had filed a petition to amend the complaint, seeking a declaration that the $2.75 per diem rate was reasonable. This rate had been promul-

gated by the AAR effective January 1, 1957. Commissioner Tuggle granted the petition on June 23, 1959.

On June 15, 1962 eighteen complainants in Docket 31358, and thirteen intervenors in support of that complaint, together with twenty-five other railroads * which were seeking leave to intervene, filed a petition seeking leave to file amended complaints, amended petitions of intervention or petitions of intervention as the case might be. This petition was filed pursuant to an order in *Baltimore & O. R. R., et al. v. New York, N. H. & H. R. R., and One Hundred and Nine Other Similar Cases Against the Above Named Defendant or Boston and Maine R. R.*, 196 F. Supp. 724 (S. D. N. Y. 1961). Those suits had been brought by 56 railroads against the New Haven and or the Boston and Maine, seeking enforcement of alleged contractual and *quantum meruit* rights to the payment of the industry-fixed (AAR) per diem charges.**

Their petition was granted on December 19, 1962. The complainants and intervenors, in accordance with the order of the New York District Court, prayed in their amended complaint, served June 7, 1963:

> "that, in addition to the relief sought in the complaint herein, as heretofore amended, the Interstate Commerce Commission, without regard to the proceeding in Docket No. 33145, . . . advise the United States District Court for the Southern District of New York . . . what per diem rate was just, fair, reasonable and non-discriminatory for each month beginning with August, 1953, to date, and in so advising the said Courts, find and declare that the

* One of these intervenors in support of the complaint was originally a defendant (Rutland Railway) and one was an intervenor in support of defendants (Savannah and Atlanta Railway).

** Similar claims had also been made in suits in the Supreme Court of the State of New York.

per diem rates which were just, fair, reasonable and non-discriminatory during the aforesaid period were: a rate of not less than $2.40 between August 1, 1953 and December 31, 1956; a rate of not less than $2.75 between January 1, 1957 and November 30, 1959; and a rate not less than $2.88 from December 1, 1959 to date."

On March 6, 1964 the Commission again granted complainants leave to further amend their complaints. The new amendment recited the promulgation by the AAR of the graduated or multilevel* car-hire rates which had become effective January 1, 1964, and prayed that the complaint be considered "as further amended by bringing into issue in this docket the [1964 multilevel] per diem rates . . . and that the Commission make a declaratory ruling thereon."

Institution of ICC Docket 34405

On March 10, 1964, the Commission served, and ordered defendants to answer, a complaint in Docket 34405. This complaint was styled *Southern Ry. et al.* v. *The Pennsylvania R. R., et al.* The complaint prayed that the Commission prescribe a future per diem rate, and that the Commission do so on a consolidated docket with Dockets 33145 and 31358. This Docket 34405 was thereafter heard on a consolidated record with Dockets 33145 and 31358.

ICC Hearings and Examiner's Report

In the meantime pre-hearing conferences and hearings had been held. After the final hearing in November 1964, briefs in the consolidated proceedings before the hearing

* These multilevel rates, and the different multilevel rates which were put into effect by the AAR on April 1, 1965, are daily rates which vary according to the cost of the individual car.

examiner were filed April 12, 1965. The examiner's proposed report was served on December 23, 1965. This report is annexed hereto as Appendix D. Exceptions were filed May 9, 1966 and Replies to Exceptions were filed September 19, 1966.

Section 1(14)(a) Amended

Effective May 26, 1966, Section 1(14)(a) of the Act was amended to enable the Commission to consider whether compensation to car owners fixed by it pursuant to that section of the Act should include an

> "incentive element . . . as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

Parallel Proceedings Before ICC

On June 23, 1966, the Commission instituted a proceeding styled Ex Parte No. 252, *Incentive Per Diem Charges*, in order to determine whether, and to what extent, the Commission should impose the incentive charge authorized by the above quoted amendment to §1(14)(a). This proceeding was discontinued by the Commission on October 3, 1967 after it found:

> ". . . upon consideration of the record herein, after enlisting the aid and advice of all railroads subject to our jurisdiction, and of other interested parties, that there is not available at this time reliable factual data which would enable this Commission to comply with the statutory requirements and make a valid decision as to the imposition of an interim incentive charge." (332 I. C. C. 11, 18)

Shortly thereafter, on December 15, 1967, the Commission instituted the proceeding styled Ex Parte No. 252 Sub. 1, *Incentive Per Diem Charges,* intended more fully to develop facts which the Commission had found lacking in its decision dismissing Ex Parte No. 252. A wide-ranging study of car-handling practices on roads throughout the country has been made and a second study is now being conducted.

The Commission's Decision in Docket 31358, et al.

The Commission denied requests for oral argument in Docket Nos. 31358, 33145 and 34405 and rendered its decision therein on January 17, 1968. That decision according to its terms establishes:

(1) That the complainants before it had failed to carry the burden of showing that the AAR per diem rates in effect from and after August 1, 1953 were just, fair, reasonable and non-discriminatory;

(2) That specific per car day rates (which are set forth in the appendix to the decision) were just, fair, reasonable and non-discriminatory rates for application as between adverse parties to the car-hire litigation pending in the United States District Court for the Southern District of New York and the Supreme Court of the State of New York, for the period August 1, 1953 through 1965;

(3) A formula based on the car ownership costs of all railroads for the years 1965, 1966, 1967 and 1968, by means of which per car day rates for application as between adverse parties to the New York car-hire litigation for the period January 1, 1966 to August 1, 1969 could be determined; and

(4) That from and after August 1, 1969* respondents in Docket 33145 be required to maintain accurate mileage records so as to permit settlement of car-hire payments thereafter on the basis of the time mileage rates found reasonable by the Commission in Docket 33145.

In its calculations of car-hire charges for the future in Docket 33145, the Commission incorporated an adjustment (in the rate of return element) ostensibly to compensate owners for the loss in purchasing power of the dollar. 332 I. C. C. at 213, Appendix E hereto, p. E38. That adjustment was made on the basis of changes in the actual purchase price of freight cars from year to year as reflected in the Account No. 53 Index of Freight Car Costs of the Commission's Bureau of Accounts, Section of Valuation. 332 I. C. C. at 210, Appendix E hereto, p. E35.

In determining the costs upon which to base car hire charges payable by Boston and Maine and New Haven,** the Commission relied entirely on studies of industry-wide, average costs collected during 1960 by its Section of Cost Finding. The Commission then used these 1960 costs to determine costs for other years by means of ratios and apportionments developed from special studies which

* Per car day rates, rather than rates based on both time and mileage elements, according to the Commission's January 17, 1968 decision, were to cease to apply in favor of time mileage rates on October 1, 1968. That date was subsequently postponed by order of the Commission dated May 29, 1968 to November 15, 1968, and then postponed *sine die* by order of the Commission dated November 13, 1968. It has now been set as August 1, 1969, by order of the Commission dated June 12, 1969.

** The rates established by the Commission for application until August 1, 1969 apply only between the opposing parties in the litigation in New York. The position of the Long Island Rail Road Company and other parties defendant before the Commission which are not involved in the New York litigation is left unclear.

were also conducted by the Section of Cost Finding. The Commission, however, refused to apply the results of the Section of Cost Finding's 1960 studies in its disposition of the "repair deficiency" or time/mileage issues, each of which involves substantial amounts of money.

References to the "repair deficiency" are somewhat misleading. This phrase has become a shorthand term for the costs which are incurred in fact by *car users* in inspecting and maintaining, as well as repairing, foreign cars, but which, *although held by the Commission to be the responsibility of owners rather than users,* are not repaid to users.

All trunk line roads employ car inspectors who inspect foreign cars at various points on line for needed repairs. Most of the cost of this inspection was held by the Commission to be properly included in the cost of owning cars. These costs are referred to as ownership inspection costs, but are in fact paid by users, not owners.

Where a foreign car is found to need replacement of a part which has become defective, the user road makes the needed repair. If a repair is made, but it was occasioned by ordinary wear and tear rather than the user's negligence, it is universally agreed that that cost also is an owner-responsibility cost rather than a cost which should be borne by the user. One reason for this is that the user may only have had the use of the car for a small fraction of the replaced part's life or may have been merely bridging the car empty to its home line and have never had any productive use of the car.

The AAR has established "repair billing rates" at which users bill owners for owner-responsibility expenses incurred by users. These repair billing rates, however,

admittedly are designed to return to the user substantially less than the expenses it incurs. For instance, the cost of inspecting foreign cars repaired, and the far more numerous foreign cars found *not* to need repair, are not covered at all by the repair billing rates; and (as the Boston and Maine and New Haven had claimed for many years) the Commission's Section of Cost Finding showed that these repair billing rates cover only a small portion of the repair facilities' overhead costs which are properly the responsibility of owners. Further, the repair billing rates only partially compensate the user for the cost of the actual part replaced. The repair billing rates were found by the Commission's Section of Cost Finding to have been less than the users' actual expenditures by $98,534,020, or 41.417 cents per car day, in the year 1960.* .

The Commission in its decision included, in the costs to be repaid to owners *via* the car-hire charge, the total amount of the owner-incurred *and user-incurred* owner-responsibility maintenance and inspection costs with no adjustment for the facts (1) that a large part of these expenses (more than $98,000,000 in 1960) *had never been incurred by owners* and therefore could not be considered compensable to owners, and (2) that these expenditures in fact constituted prepayments of car-hire by users and, if the use of averaging in determining car hire charges was proper, should be considered as a credit applied to each car day's rental incurred by users, thus reducing the net payment per day by car users.

Although appellants are willing to concede that the Commission could refuse to make an adjustment in the

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* Report of the Commission, 332 I. C. C., at 189-190, Appendix E hereto, pp. E14-E15.

rate for the latter fact and could remit appellants to seeking repayment by way of counterclaim in the suits in the Southern District of New York, it was clearly unlawful for the Commission to include in the "costs" of ownership any amount which was not in fact spent by owners.

Judicial Review

On January 30, 1968, Civil Action No. 68-79-G was instituted by Boston and Maine and on May 17, 1968 a supplemental complaint was filed by New Haven in Civil Action No. 56-1004-G. These actions to set aside the Commission's decision were consolidated by order of the district court dated June 14, 1968.

On or about February 23, 1968, the action styled *Union Pacific R. R.* v. *United States and Interstate Commerce Commission*, Civil Action No. 02981, was instituted in the District of Nebraska to have set aside the Commission decision.

On April 24, 1968, the action styled *Baltimore & O.R.R.* v. *New York, N.H. & H.R.R.*, Civil Action No. 148-323 in the District Court for the Southern District of New York, was stayed pending final judicial review of the subject Commission decision.

By order dated June 19, 1968 in the consolidated actions below, appellees herein were restrained during the pendency of this litigation from seeking to enforce the subject Commission order, except so much of the order in Docket 33145 as requires roads to maintain accurate mileage records. By order dated November 7, 1968, the District Court for the District of Nebraska in *Union Pacific R. R:* v. *United States, et al.*, Civil Action No. 02981, described above, temporarily enjoined the enforcement of the entire Commission order in Docket 33145. We are informed that that injunction has now been dissolved. Unless stayed by this Court, the record-keeping provisions of the Commission order in

Docket 33145 will become effective August 1, 1969 (see footnote*, p. 24, above).

Oral argument in the consolidated actions was had below on November 8, 1968, and the decision of the court was rendered on March 18, 1969. In it, the district court held that the terms of its remand had been complied with and that the Commission had properly set specific rates for the past (notwithstanding its failure to incorporate a mileage element in them) and had properly established procedures for setting car-hire charges for the future. It held that the Commission properly included in the amounts to be returned to complainant car owners (via "per diem") amounts which reflect costs never incurred by car owners—the "repair deficiency." It held that the Commission's use of a replacement cost index was proper to provide owners with protection from inflation. It held that the Commission, in granting compensation to complainant car owners for past use of freight cars, had discretionary power to relieve complainant car owners of the burden of proving their actual costs, and to base its findings solely on the average costs of all car owners. It held that the Commission "properly was not concerned" with whether the rates which appellants had offered to pay* complainant car owners for past use of freight cars fell within any "reasonable zone or range of rates", and in fact that there is no such "reasonable zone or range" of car-hire charges. Finally the court rejected the claim that appellants had been denied their rights under the Administrative Procedure Act by the Commission's reassignment of hearing examiners and the Commission's subsequent refusal to give appellants access to information concerning the assignment and reassignment of examiners.

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* Since the withdrawal of appellants Boston & Maine and New Haven from Agreement No. 7 on June 10, 1953, they have permanently settled car-hire for the past with various roads at other than "industry rates" as shown by the "Statements of Satisfaction of Complaint" in the Commission's record of these proceedings.

Appellants assert that the court erred in these respects. Appellants also assert that the majority of the court erred in its 1958 decision in Civil Action No. 56-1004-M by concluding that the Commission had jurisdiction to adjudicate past car-hire claims, and appellants respectfully refer to the dissenting opinion reported at 162 F. Supp. 298 for the expression of appellants' view as to the limitations of the Commission's jurisdiction with respect to car-hire.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND REQUIRE THIS COURT'S PLENARY CONSIDERATION

These appeals raise questions of general importance as to the interpretation of the Interstate Commerce Act and the Administrative Procedure Act.

Two of the questions presented by these appeals have previously been submitted to this Court in the 1958 appeal in Docket No. 310, *Boston and Maine Railroad, et al.* v. *United States, et al.* Those questions concern: (i) the lack of jurisdiction in the Commission to adjudicate car-hire claims for the past; and (ii) the lack of obligation on the part of car users to pay car hire at any rate in excess of the lowest reasonably compensatory rate. The appeal in Docket No. 310 was dismissed as premature in view of the remand of the district court and in view of the fact that the record in Docket No. 310 presented "only 'an interim' ruling." (358 U. S. at 72.) The several other questions presented by these appeals developed subsequent to this Court's prior decision.

1. The Commission's Lack of Jurisdiction to Determine Car-Hire Rates for the Past.

The 1956 decision in the Massachusetts District Court (Civil Action No. 56-1004-M) authorized the Commission to by-pass the only rule-making provision applicable to car-hire, §1(14)(a) of the Act. The district court held

that the declaratory order procedure and the provisions of §§1(11), 13(1) and 16(1) of the Act were an appropriate jurisdictional basis for the adjudication of car-hire claims for the past. That court, however, remanded the proceeding to the Commission for further study of a proposal to assess car-hire on a time mileage rate rather than a strict time (per day) rate.

The 1969 decision of the district court in the consolidated cases, Civil Action Nos. 68-79-G and 56-1004-G, found that on remand the Commission properly acted pursuant to the authority of §*1(14)(a)* in Dockets 33145 and 34405 * in setting car-hire rates, or methods for determining such, for the period August 1, 1953 to August 1, 1969. (Decision below, 297 F. Supp. 615, 617, Appendix F hereto at p. F3). These dockets were instituted in 1959 and 1964 respectively.

Insofar as the decision below upholds the Commission's jurisdiction (under §1(14)(a)) to determine claims for car-hire *for past periods* by enforcing retroactive regulatory rules or declarations respecting car-hire, it does so without authority and contrary to law. §15(2) of the Act; §§2(c), (d), 4(c) of the Administrative Procedure Act, 5 U. S. C. §§551(4)-(7), 553(d); *cf. Brimstone R. R.* v. *United States*, 276 U. S. 104 (1928); *cf.* also *United States* v. *Baltimore & Ohio R. Co.*, 284 U. S. 195 (1931). The 1969 decision of the court below on this point asserts a jurisdictional basis different from that which the court found to exist in 1958. The newly asserted basis was considered only in the 1958 dissent, wherein the late Judge McCarthy discussed a point which the majority opinion then did not decide, noting that:

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* Apparently the court below assumed that Docket 31358 had been dismissed by the Commission after it found that the complainants before it had failed to show the industry fixed (AAR) rates to have been just, fair or reasonable.

> "1. The fact that the charges could have been established under Section 1(14)(a) is not enough for the Commission to endorse them. *Under that section the Commission could not establish rates retroactively.*" (162 F. Supp. at 300, Appendix C hereto, p. C23.) (Emphasis added.)

The 1969 decision asserts an impossibility because §1(14)(a) speaks only to regulation of future acts, the Commission did not even have a regulatory proceeding before it until 1959, and did not issue a regulation thereunder until 1968. By the Commission's own order, this regulation is not to become effective until August 1, 1969.

Though the 1969 decision of the court below cited only the authority of §1(14)(a), the Commission was also without statutory authority to adjudicate claims for past car-hire under §1(11), and was accordingly without jurisdiction to enter a declaratory judgment regarding such under §5(d) of the Administrative Procedure Act, 5 U. S. C. §554(e). The rule-making provision relating to car service (§1(14)(a)) specifically includes the subject matter of "compensation" payable by one railroad for the use of another's cars. Thus the Commission unquestionably has specific authority to *regulate* car-hire. But §§1(10) and 1(11), enacted contemporaneously therewith,* though they follow the language of §1(14)(a) very closely, omit the reference to compensation. In 1958, the majority decision (162 F. Supp. 289, at 293-4, Appendix C at p. C7-C9) read "compensation" into §§1(10) and 1(11) in order to uphold the Commission's jurisdiction to adjudicate claims for past car-hire.

Thus two questions are presented: (1) whether §1(14)(a) of the Act gives the Commission authority to *adjudicate* claims for car hire for *past* periods; and (2) whether

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* The Esch Car Service Act of May 29, 1917, C. 23, 40 Stat. 101.

§§1(10) and 1(11) give the Commission authority to adjudicate compensation for car use, even though those sections omit any reference to such a power. *Cf. Chicago, Rock Island & Pacific Ry.* v. *United States*, 284 U. S. 80, 99 (1931); see also *Missouri Pacific R. R.* v. *Norwood*, 283 U. S. 249, 257 (1931).

2. The Substantial Evidence Rule.

In determining the past car-hire rates to apply between the plaintiffs and defendants in the car-hire litigation pending in New York, the Commission included in the cost base, upon which the car-hire rates were calculated, substantial amounts which admittedly were never expended by car owners. It is undisputed that car owners are actually credited in the Commission's calculations with expenses which in fact were incurred not by car owners but by car users. These expenses are loosely referred to as the "repair deficiency." The repair deficiency for the Commission's base year (1960) was in excess of $98,000,000.

Though it is clear that car users have "prepaid" this 98 million dollars, the Commission has, by belatedly refusing to consider this prepayment contemporaneously with its adjudication of the basic car-hire rate for the past, remitted Boston and Maine and New Haven to asserting their right of recoupment by way of counterclaims in the District Court for the Southern District of New York and the Supreme Court of the State of New York. Appellants do not attack that determination here, though it would not appear to be the most efficient disposition of this complex matter. However, both the Commission and the district court have also concluded that owners are entitled to have these amounts *included* in the amounts which *owners* expended and for which they can look to users for "compensation". The Commission has held that the car users' expenditure shall be deemed the car owners' "cost of ownership". Appellants consider this plain error.

The car owners cannot lawfully recover, via car hire, money that they admittedly never spent. A "cost of ownership" must be an expenditure by owners. No amount of administrative expertise can justify so bald a transfer of funds from one side of the ledger to the other.

The district court, in endorsing a decision of the Commission allowing the complainants in Docket 31358 "compensation" for expenses which the record indisputably shows were never incurred by them, disregards a patent violation of due process and section 7(c) of the Administrative Procedure Act, 5 U. S. C. §556(d). Appellants assert that the Commission's inclusion of these amounts in the cost base on which the car-hire rates were calculated is unsupported by any evidence, and that the court below should have so held.

3. The Failure of the Commission to Include a Mileage Element in the Car-Hire Charges for the Past.

In its 1958 decision, the court below remanded Docket 31358 to the Commission for further consideration with respect to the inclusion of mileage as one of the determinants of the car-hire charge. This remand reflected the court's view that the costs of car ownership might appropriately be related both to the passage of time (for which a per day rate would be appropriate) as well as to the amount of use which car users make of owners' cars (for which a per mile rate would be appropriate). The Commission in its 1968 decision modified its insistence upon a time only rate, and found

> "*That reasonable compensation to car owners requires that the ownership costs be distributed among and borne equitably by all railroads making use of such cars in just proportion to the amount of use, that the use made of cars must be measured by both the length of time cars are held and the amount of*

> *activity to which they are subjected, and that the most practicable and reliable method of measuring car activity is the line-haul mileage over which they are moved. . . .*" 332 I. C. C., at 258, Appendix E hereto, p. E83. (Emphasis added.)

That finding was not a finding limited in application to only one or the other of the proceedings before it, as were some of the Commission's findings, but rather one of general relevance to the proceedings had.

The Commission also found, however, that

> ". . . no practicable and probative method has been demonstrated on this record by which a reliable estimate might be made as to the distribution of costs between time and mileage for individual defendants in past years, or for all railroads for years other than 1960." 332 I. C. C. at 247, Appendix E hereto, p. E72.

The use of ratio analysis to produce passable statistics for application to years other than 1960 was as to this issue held unsuitable despite the assertions of the Commission's own Section of Cost Finding, the Commission's Bureau of Enforcement, and the hearing examiner, that these calculations could and should be made.

From the findings (1) that time and usage were both "required" elements in a "reasonable" car hire charge, and (2) that the data necessary for the separation of time and usage elements in rates for the past was not in the record, the conclusion of the Commission was not that the complainants had, to that extent, failed to carry the burden of proof. Nor was it that further evidence on the point would be received. Nor did the Commission hold that the known and confirmed 1960 mileage figures for individual roads would be used as a basis for estimating relative mileage figures for other years. On the contrary, the Commis-

sion concluded that, in this adversary proceeding to recover claimed car-hire charges for the past, the failure of proof by complainants justified imposition on defendants (appellants herein) of a car-hire charge based solely on time.

The Court below has now endorsed this conclusion as within the Commission's discretion because "the law does not demand the impossible." 297 F. Supp. at 619, Appendix F. p. F6.

Appellants assert that the Commission's decision is internally inconsistent on this critical issue and that, even aside from its internal inconsistency, the Commission does not have discretion in an adjudicatory proceeding to burden the defendants before it with the consequences of a failure of proof on the part of the complainants.

By exclusion of any consideration of a mileage factor in the car-hire rate prior to August 1, 1969, complainants have been given a major concession covering the 16 year span as to which the Commission's decision (if upheld) as to past rates will apply. Conversely, appellants (defendants before the Commission), which have for 16 years been asserting the principle which the Commission has finally upheld, are to be denied the benefits which an application of that principle would provide.

The average mileage per day of appellant Long Island illustrates the extreme inequity which would result from allowing the Commission's decision to stand. The average daily distances foreign per diem cars were moved in 1960 by the Long Island, as found by the Commission, was 4.8 miles.* Yet the impact of the Commission's decision to ignore mileage for the past is to make the Long Island pay as if it moved cars the average daily distance all foreign cars were moved on all roads, i.e. approximately 59.2 miles

* 332 I. C. C. at 219, Appendix E hereto, p. E44.

per day in 1960. Similarly Union Pacific, in paying for the use of New Haven cars for example, would be required by the Commission to pay for only that same average 59.2 miles per day, though the Commission found that the Union Pacific moved foreign per diem cars on Union Pacific rails an average of 120.9 miles per day in 1960.** The refusal to give appellants the benefit of the mileage factor for which they fought will create gross injustice and constitutes arbitrary and unreasonable treatment.

The court below apparently agreed that a result based on the national average daily distance foreign cars are moved by all roads combined, i.e. the result reached by the Commission by refusing to apply any mileage factor, would be unjust.

> "On the basis of these figures for 1960 it seems *obvious* that an average figure for line-haul mileage would *not be fair or just.*" 297 F. Supp. at 620, Appendix F, p. F9. (Emphasis added.)

It nevertheless refused to set the Commission decision aside, apparently unaware that this is precisely what the Commission decision as to the past is based on.***

Appellants consider this refusal to apply mileage to the past to be arbitrary and unreasonable, particularly in view of the fact that it is supported by the Commission, and endorsed by the court below, solely on the ground that the required data was not available. Appellants

* Statement of R. W. Fondersmith of the Commission's Cost Finding Section, Exhibit R-8, p. 43.

** 332 I. C. C. at 220, Appendix F, 12 note, p. F45.

*** What appellants had argued for below was the use of aggregate and ratio analysis in arriving at an average daily mileage figure for New Haven, for instance, and for each of the other individual adversary roads, *not* a single national average for all roads which both the court below and appellants here agree produces an unfair and unjust result.

have fought for years to show that car hire payments must be based on use as well as time in order to be equitable. Other railroads asserted that the Commission must find the industry (AAR) rates fair and just. Yet, despite the Commission's finding against the industry rates, and despite the finding that equitable rates must include a mileage factor, and despite the assertions of the Section of Cost Finding and the hearing examiner that a mileage factor could be applied to past years, the Commission cast upon the defendants before it (appellants herein) the burden of proving the actual miles traveled by each individual car on their lines. What the Commission is saying is that averages are fine for practically all costs—indeed, even national average costs, rather than those of complainants'—but to apply a mileage factor defendants must show the actual mileage of each freight car rented from 1953 to 1969. The Commission's action in this regard is without support in law or fact.

4. The Commission's Adjustment for the Loss in Purchasing Power of the Dollar.

The Commission, in adjusting the rate of return element of the costs compensable to owners for the effects of inflation, used an index known as the Account No. 53 Index. That index in fact bears no necessary relation to the loss in the purchasing power of the dollar and does not even purport to assess the effects of inflation. It is merely a historical record of the cost of freight cars, and does not purport to isolate the effects of inflation from the effects of improved design, increased size or changed technology, and the Commission so found:

> "It . . . appears that the index includes other improvements which form integral parts of new cars such as improved metallurgical design of wheels, self-aligning trucks with one-piece cast steel bolsters, case steel side frames with integral journal boxes, stabilizing devices, snubbing features built into side

frames, wear plates in critical wear areas, journal roller bearings, improved coupler designed [sic] and draft gears design advances." 332 I. C. C. at 210. Appendix E hereto, p. E55.

It is a *freight car* index, not a *money* index. Even if owners used car-hire revenue *only* to buy freight cars, and they of course do not do so, the use of the Account No. 53 Index would be improper. Accordingly, if the Commission in fact rejects the use of reproduction costs for calculating ownership costs, as it purports to do (332 I. C. C. at 258, Appendix E hereto, p. E83), the use of the Account No. 53 Index was clearly improper.

Appellants assert that the Commission, once it decided to make an adjustment for inflation, was bound to use an index appropriate for that purpose. The index widely approved for that purpose, the Wholesale Price Index of the Bureau of Labor Statistics, would clearly have been proper. The question presented by the Commission's action is whether, under the guise of an adjustment for inflation, the Commission may incorporate in the cost base for determination of car-hire charges, fictitious "costs" based on an index showing the year to year purchase prices of freight cars.

5. The Discretion of the Commission to Use Average Costs in Adjudicating Rates for the Past.

The court below decided that the use of average costs in adjudicating car-hire rates for the past was within the Commission's discretion. Appellants contend that the use of national average costs in an adjudicatory proceeding to determine claims between individual railroads is unlawful. The Commission itself has recognized this distinction between adjudicatory proceedings under 1(11) of the Act and rule making proceedings. *Keith-Ry. Equip. Co. v. Association of Amer. Railroads*, 274 I. C. C. 469, 481 (1949).

Whether the Commission action in adjudicating claims for past per diem was taken pursuant to §1(14)(a) or §1(11) of the Act, there is no authority for the district court's deviation from orthodox principles in determining where the burden of proof lies and how it must be carried. The district court has apparently concluded that the Commission's consolidation of a regulatory proceeding for the determination of prospective per diem charges, with an adjudicatory proceeding for the determination of past charges, has not only created jurisdiction over past car-hire charges (see 1, *supra*) and has relieved the individual complainants in the adjudicatory proceeding of the burden of proof with respect to the mileage factor (see 3, *supra*), but has also relieved complainants of the burden of proof as to their individual costs of car ownership.

Such a result is all the more remarkable because, in determining car-hire rates for the past, the Commission considered its findings "of significance only as an aid to the courts in settling the amount of damages in the pending lawsuits" (332 I. C. C. at 183, Appendix E hereto, p. E8) referring to the District Court for the Southern District of New York and the Supreme Court of the State of New York in which the complainants in ICC Docket 31358 had brought contract and *quantum meruit* actions. (See above, pp. 20-21.) The question thus presented is whether the burden of proof which devolves upon a plaintiff in any civil proceeding can be avoided by obtaining a reference to an administrative agency.

6. The Obligation of Car Users to Pay Car-Hire.

If it be assumed that the Commission has jurisdiction under §1(14)(a) or §1(11) to adjudicate past claims for car-hire, the right of car owners to receive thereunder reasonable compensation cannot impose on car users an obligation to pay any more than the car-hire rate which is at the lower limit of the range of reasonably compensatory rates. Since a zone of reasonableness exists and

since the Commission is without power to reject rates which fall therein as unlawful (*cf. Georgia v. Pennsylvania R.R.*, 324 U. S. 439, 460-61 (1945)), the Commission has no power (aside from the use of its regulatory power prospectively to establish uniform rates for all roads) to set car-hire rates unless it first finds that the rates offered are below the zone of reasonableness.

Although the Commission has rejected, as not shown to have been reasonable, the car-hire rates claimed *by* the complainants before it in Docket 31358, the Commission has *not* made any findings as to the reasonableness of the car-hire rates offered *to* the complainants by appellants. Instead, the Commission argued, and the court below held, that there is no zone of reasonableness and that the rates determined by the Commission are the *sole*, just, fair and reasonably compensatory rates.

The question presented therefore is whether there is a zone of reasonableness for car hire charges and, if so, whether the Commission in passing upon claims for past car-hire must make findings as to the reasonableness of the assertedly reasonable rates offered by appellants.

7. The Commission and the Procedural Safeguards of the Administrative Procedure Act.

In the course of the proceedings before the Commission, a hearing examiner (Examiner Mittelbronn) assigned to these proceedings was relieved of his assignment under circumstances which indicated possible breaches of those provisions of the Administrative Procedure Act designed to preserve the integrity and independence of hearing examiners, 5 U. S. C. §§556(b) and 554(d). Appellants Boston and Maine and New Haven sought reinstatement of the reassigned examiner (Petitions dated December 24, 1959, February 6, 1960 and April 15, 1960), and even

offered to waive all procedural error if the examiner originally assigned to the proceedings in 1953, Examiner Hosmer, were reassigned to the reopened proceedings.

The Commission rejected appellants' petitions and refused all of appellants' requests for information, including those relating to the Commission's compliance with the provisions of Section 11 of the Administrative Procedure Act, 5 U. S. C. §3105, which establishes procedures for assignment of hearing examiners "in rotation so far as practicable." In its opinion and order dated September 5, 1962 (Appendix G hereto), the Commission denied appellants' requests for copies of the rotation list (if any) maintained by the Commission. And although it catalogued a number of general reasons why assignment of examiners in "strict rotation" might not be practical or even possible, the Commission did not assert any of those reasons to be applicable in this case. Furthermore, the Commission refused to indicate whether or not it attempted to follow any system of rotation for examiners at all, nor would the Commission state whether or not the Commission even maintained a "rotation list" of hearing examiners.

In the court below, appellants served a notice to admit upon defendants and intervening defendants. Among the facts as to which admission was sought were the facts alleged by appellants concerning the circumstances of the substitution of hearing examiners, and the fact that the Commission maintained no system, for application either in this case or in any other, for the assignment of hearing examiners "in rotation." The court below found the notice to admit improper and refused to enforce appellants' notice.

Appellants consider that they have been denied the protection of Sections 5(c), 7(a) and 11 of the Administrative Procedure Act, 5 U. S. C. §§554(d), 556(b) and 3105 and that the court below erred both in failing to enforce appellants' Notice to Admit Facts and in failing to set

aside the order of the Commission in Dockets 31358, 33145 and 34405 for failure to comply with the provisions of the Administrative Procedure Act. The question raised is whether the Administrative Procedure Act prohibits the Commission from changing hearing examiners at will, refusing to recognize any obligation to maintain rotation lists or to appoint examiners in rotation, and clothing its actions and procedures in a shroud of secrecy.

CONCLUSION

The Court has jurisdiction of this appeal, and the questions presented hereby are so substantial as to require plenary consideration with briefs on the merits and oral argument.

s/ M. Lauck Walton

Carl E. Newton, Esq.
M. Lauck Walton, Esq.
Attorneys for Appellants
Boston and Maine Corporation
Richard Joyce Smith, Trustee of the New York, New Haven and Hartford Railroad Company
The Long Island Rail Road Company
The Class II, Terminal and Switching Railroads listed at pages 1 and 2 hereof

Of Counsel:

George M. Onken, Esq.
Richard H. Stokes, Esq.
Granville Whittlesey, Jr., Esq.
David G. Scannell, Esq.
J. Peter Coll, Jr., Esq.

APPENDIX A

INTERSTATE COMMERCE COMMISSION

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY (H. K. NORTON, TRUSTEE) ET AL.

Submitted Decided

Per diem charges of $1.75 and $2 for the use of railroad-owned freight cars wheu on the lines of rail carriers other than their owners in effect prior to August 1, 1953, found reasonable and a charge of $2.10 found reasonable for present use. Declaratory order entered.

S. R. Brittingham, Jr., R. R. Bongartz, Carson L. Taylor, J. P. Fishwick, F. E. Baukhages, C. C. Howell, E. H. Burgess, D. O. Mathews, Eldon Martin, Edwin C. Matthias, D. S. Wright, B. J. Viviano, Thomas T. Railey, H. Merle Mulloy, J. L. Homire, Seddon G. Boxley, J. T. Suggs, W. C. Plunkett, J. H. Miller, J. L. Rice, R. S. Outlaw, J. H. Wright,

E. J. Zoll, Jr., J. Carter Fort, Jr., Alfred W. Hesse, Jr., Martin A. Meyer, Jr., and *George W. Holmes* for complainants.

Carl Newton, Granville Whittlesey, W. J. Hickey, J. W. Grady, H. D. Boynton, Richard Jackson, Lawrence Chaffee, William A. Colton, Richard Swan Buell, and *Joseph P. Hawryluk* for defendants.

Hewitt Binett, J. C. Kauffman, Ross L. Thorfinnson, W. H. Parsons, Prime F. Osborn, III, Thurmond A. Miller, M. C. Smith, Jr., Robert D. Brooks, John Colgren, Kemper A. Dobbins, Warren H. Ploeger, W. H. Fitzpatrick, John F. Reilly, Paul F. Robinson, and *Martin L. Cassell* for intervenors in support of complainants.

W. J. Hickey, Matthew Crawford, and *Milton Ferguson* for intervenors in support of defendants.

REPORT PROPOSED BY HOWARD HOSMER, EXAMINER

The complaint herein was filed September 21, 1953, by 19 of the larger class I railroads listed in the footnote.[1] The defendants include among others 5 class I railroads: Boston and Maine Railroad; The Long Island Railroad Company (William Wyer, Trustee), (the Long Island); The New York, New Haven and Hartford Railroad Company (the New Haven); New York, Susquehanna & Western Railroad Company (the Susquehanna); and the Rutland Railway Corporation. Six short line railroads are also defendants: Atlantic & East Carolina Railway Company; East Tennessee and Western North Carolina Railroad Company; St. Johnsbury & Lamoille County Railroad; The New Jersey and New York Railroad Company (Horace Banta, Trustee); and Mississippi & Skuna Valley Railroad Company. The last named defendant is a class III railroad; the foregoing 5 are class II lines.

[1] The Atchison, Topeka and Santa Fe Railway Company; Atlantic Coast Line Railroad Company; The Baltimore and Ohio Railroad Company; Chicago & Eastern Illinois Railroad; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Great Northern Railway Company; Gulf, Mobile & Ohio Railroad Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Reading Company; The St. Louis-San Francisco Railway Company; Southern Railway Company; The Texas and Pacific Railway Company; The Virginian Railway Company; Wabash Railroad Company.

There are 14 interveners in behalf of the complainants, all of them being class-I railroads. The interveners in behalf of defendants, 57 in number, are railroad carriers principally in classes II and III. All the interveners are listed in the appendix.

The complaint grows out of a disagreement between the complainants and the defendants concerning the reasonableness of per diem charges for the use of railroad-owned freight cars payable by nonowning railroads. In *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383, decided July 11, 1949, (hereinafter referred to as the 1949 report), the Commission found that the per diem charge of $1.50 per day then in effect was not shown to be either unreasonably high or unreasonably low. Effective November 1, 1949, that charge was increased to $1.75 by action of members of the Association of American Railroads (hereinafter called the AAR) under procedure described in the 1949 report.

The procedure for establishing per diem charges was considered by division 2 of the Commission in *Association of American Railroads Agreement*, 277 I.C.C. 413, and approved as conforming to section 5a of the Interstate Commerce Act. The report included the following paragraph:

> Articles XI and XII accord to each subscriber certain individual rights. The former states that the agreement shall not be construed to prevent or limit recourse to this Commission by any subscriber for any

relief (in pending proceedings, or otherwise) accorded by law in respect of any of the matters covered thereby. The latter (article XII) provides that all subscribers shall have the free and unrestrained right to take independent action either before or after any determination arrived at through the procedure provided for in the agreement.

This agreement became effective October 7, 1950. Under the procedure which it set up the per diem charge was increased to $2, effective May 1, 1952, and to $2.40, effective August 1, 1953.

The Susquehanna, which was not a party to the agreement, notified the complainants in March 1951 that after April 1, of that year it would refuse to pay the charge of $1.75 but would settle on a graduated scale ranging from $1.20 to $2, depending on the age of the car. In 1953 it offered to increase that scale to a range between $1.33 and $2.21. The complainants refused those offers, and the car rentals payable by the Susquehanna are now involved in a number of pending lawsuits.

In June 1953 the Boston & Maine, the New Haven, and the Rutland gave notice of their refusal to pay the charge of $2.40 as well as to pay the former $2 charge after July 31, 1954. Later the Boston & Maine offered to pay on a graduated basis or a flat rate of $1.72 per day. The Long Island in August 1953 advised that it was willing to continue paying a $2 charge but would not accept the $2.40

charge. The Atlantic & East Carolina, St. Johnsbury & Lamoille County, New Jersey & New York, and the Barre & Chelsea have followed a similar course. The situation with respect to present payments by defendants other than those here named is not disclosed.

It is alleged in the complaint that, to the extent that the defendants have paid and are paying or offering to pay charges less than those generally in effect as above indicated, "such payments have been, are and would be unjust, unreasonable and noncompensatory, in violation of paragraphs (4), (10) and (11) of section 1 of the Act; and such action by defendants has been, is and would be disruptive of the 'uniform national basis' of handling per diem, which has been deemed necessary by the Commission in order to facilitate 'the performance of orderly transportation service by railroad in the public interest.' *Association of American Railroads—Agreement, supra,* 423." The prayer of the complaint is that—

> the Commission find and declare that the per diem rates of $1.75 and $2, during the period in which these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that the Commission grant such other and further relief as may be required in the premises.

The complainants expressly disclaim any intention to invoke the only specific power with respect to per diem which the Commission has, namely by section 1 (14)(a) to establish "the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier)". Such action would involve the entry of an order, which presumably would continue in effect for the indefinite future and, unless it were vacated or modified, would render the present procedure for dealing with per diem charges inoperative.

In a joint answer to the complaint filed by the Boston & Maine, the New Haven, and certain short-line defendants these parties ask "that the Commission find and determine and fix by order the rate or rates for the use of freight cars to be paid by complainants to defendants and by defendants to complainants." The short-line defendants and interveners request in their briefs that the Commission determine and definitely fix the amount of compensation to be paid by a rail carrier when it uses the freight cars of another, but the briefs of the other defendants are less positive. The New Haven and the Boston & Maine ask for a declaration that the present per diem rate is unlawful and as a maximum should not be more than $1.04 per day if it is to be fixed as a single amount. Alternatively they prefer a graduated scale. The Susquehanna asks principally that the graduated scale which it favors be found not unreasonably low or noncompensatory. The Long Island

and the New Jersey & New York urge that the complaint should be dismissed and assert that the Commission is not empowered to prescribe charges for car hire retroactively. As was suggested at the prehearing conference, it appears that the majority of the parties, except the short lines, prefer that the Commission take action in the nature of a declaratory order, which under section 5(d) of the Administrative Procedure Act it may issue "to terminate a controversy or remove uncertainty." Manifestly there is a controversy here and uncertainty as to the measure of just compensation due complainants from the defendants for the use of cars owned by the former.

With the exception of its action in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, which was set aside upon judicial review, *Palmer* v. *United States*, 75 F. Supp. 63, the Commission has never undertaken to establish a general basis of per diem charges under its authority in section 1 (14)(a). The present system of rentals in its broad form has been worked out by the railroads themselves. The per diem plan was adopted in 1902 after a mileage system was found to be unsatisfactory for reasons mentioned in *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 375. The charge has been uniform for all types of cars, and up to the time of the present controversy it has applied uniformly to all railroads, subject to the operation of reclaims. In its 1949 report (p. 386) the Commission said:

> For many years the per diem rate has been based on average costs. The daily rental for a car valued at $2,000, for example, is the same as that for a car worth

twice as much. There is no request herein for different per diem rates on freight cars of different ages, sizes, or classes. A carrier which has a foreign railroad car on its rails immediately after midnight pays the rental for that calendar day in the absence of some special agreement. If it receives a car in interchange after midnight and delivers it in interchange before the following midnight, it does not pay any car rental.

Some of the defendants here question the principle of uniformity and introduced evidence in support of their views. These will be discussed before the main issues in the case are considered.

Both the Long Island and the New Jersey & New York, whose lines are partly in the metropolitan area of New York City, perform comparatively short line-hauls in their freight service. The average detention per car in their terminals is high. These defendants believe that the basis of per diem charges should take into account a distinction between items of car-ownership cost attributable to movement use (mileage) and those related to the passage of time. They therefore suggest a basis under which "each using road would pay time costs in proportion to the time that it holds the car and mileage costs in proportion to its own mileage use of the car."

Unless the Commission dismisses the complaint, the Long Island and the New Jersey & New York urge that it—

(a) undertake to determine true freight car ownership costs * * * (b) make an accurate separation of

> such costs between time and mileage; (c) determine separate average unit costs for time and mileage; and (d) fix separate car hire charges for each user road reflecting the average time and mileage costs for which such road is responsible.

Admittedly such a determination could not be made from the evidence in this case. Apparently it would involve a gigantic statistical undertaking. If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling per diem accounts.

The New Haven and the Boston & Maine suggest a plan of per diem charges under which there would be a variation of rates with respect to owner railroads based on the average age of their cars. The Susquehanna also supports this suggestion. According to the sponsors, this plan "by giving higher rent for new than for old cars would furnish an incentive to car owners to renew the fleet and to get rid of old equipment." The steps necessary to carry out the plan are stated as follows:

> Mr. Glacy's program assumed that in each year the AAR would ascertain for each owning railroad the inventory of its cars; ascertain for each group of cars of each railroad the proper charge per day; and derive for each railroad a composite figure which was the weighted average rate per day for its entire fleet. The AAR would then publish a booklet showing each own-

ing railroad's composite rate, which would be the basis.

This plan, too, would necessitate a complicated statistical operation to ascertain the proper composite figure, and it may well be doubted whether the clerical labor required in computing per diem credits would be as simple as the sponsors believe.

As above indicated, the suggested plans for varying per diem charges could not be put into effect without an extensive investigation either by the Commission or by the AAR. The facts and arguments here presented are not deemed persuasive that plans of this kind are desirable. If the Commission should have a different view, however, there would still be a considerable interim in the future in which a single uniform charge would necessarily have to be applied. Furthermore the issue of reasonableness of the present charge and its immediate predecessors raised in this proceeding must be decided.

There is general agreement that car rentals, whether established by the Commission or otherwise, should be reasonably compensatory and no more, *Palmer* v. *United States, supra,* 69. The determination is essentially a problem in cost accounting. The earliest attempt to deal exhaustively with the problem was made 45 years ago by the socalled McCrea commission, composed of 5 railroad presidents. They adopted the principle that the per diem charge should cover (1) repairs, (2) taxes, (3) depreciation, (4) interest on investment, and (5) miscellaneous ex-

pense incidental to ownership. This principle has been generally accepted as valid ever since, but there has been continuing controversy as to how the principle shall be applied. Indeed the members of the McCrea Commission themselves reached three different conclusions on that point.

The principle just referred to serves as a guide for the General Committee of the AAR, which is charged with studying proposals for changes in per diem rates, aided by a subordinate special committee, known as the Subcommittee on Mileage and Per Diem. Costs are allocated to the various categories from expense figures reported to the committees in response to questionnaires sent to car-owning railroads. The General Committee alone decides what proposed changes in the per diem rate shall be recommended to the Board of Directors of the AAR for submission to subscribers to the per diem agreement.

In its 1949 report the Commission discussed the allocations of costs for 1946 presented in support of the per diem charge of $1.50 there in issue. It criticized some of the allocations as too large, but in respect of other important items it made comments which could be interpreted as finding that those items were understated. In an appendix there were shown "averages of such costs as reallocated in the accompanying report" apparently indicating a view that the average cost per active freight car per day was $1.92 in 1947.

It is understandable, therefore, that the complainants lean heavily on the 1949 report, on which they comment in their brief as follows:

> * * * the Commission resolved in favor of the present complainants almost every issue now in dispute, and indicated approval of, if it did not formally prescribe, a formula for the ascertainment of per diem rates which, when applied in this case, establishes the validity of the rates that defendants are here assailing.

If the 1949 report is to be construed as prescribing a formula, the complainants should prevail in the instant case, for that report contains a number of statements highly favorable to their contentions. In the 1949 report, however, the Commission dismissed the complaint in No. 29587, brought by the short lines, which asked the Commission among other things "to promulgate a formula to be employed in the future in determining the lawful compensation to be paid for the use of railroad-owned freight cars." Also it dismissed the complaint in No. 29751, in which six large western lines took the position that the per diem charge of $1.50 was "inadequate, unjust, and noncompensatory." Therefore the soundest interpretation of the 1949 report seems to be that the statements therein were intended to have no significance except as reasons for approving the charge of $1.50 per day.

In this case the complainants seek findings which would approve all per diem charges established after the 1949 report. In each instance the General Committee studied

statistics reported by class 1 railroads in response to questionnaires. Those upon which the charge of $1.75 was based were for 1948, but there was an adjustment to reflect wage rates, material prices, and payroll taxes and other determinable increases up to September 1, 1949. The statistics pertaining to the $2 charge were those for 1950, projected to include cost levels as of April 1951. Full recognition was thus given to the 40-hour week, which was in effect throughout 1950. The present charge of $2.40 was based on figures for 1952. The information for the latter year was received from 121 railroads, having approximately all the freight-car ownership of class 1 railroads. Concerning the latest study, the complainants' principal witness testified that it "came closer to applying the Commission formula [1949 report] than any of its previous studies leading to a per diem adjustment."

Freight car repairs—This is the largest single category of expense included in the per diem charge and amounts to about 40 per cent of the total. Also it is used as a basis of allocating certain other costs.

The basic figures for this item are derived from account 314, Freight Train Cars—Repairs, in the accounting classification. The reported total for 1952 was $586,914,603. To this the General Committee added $24,965,504 for switching home freight cars marked for repairs, and deducted $65,887,034 for costs of car users' repairs to foreign cars damaged by them through improper handling, compensation for foreign cars destroyed on car users' lines,

certain switching costs, and a portion of labor costs of inspection and other service at terminal and junction points. The reasons for these adjustments were stated on pp. 390-1 of the 1949 report. The complainants thus estimate the cost of repairs at 97.836 cents per active car day.

In the 1949 report the Commission found that there should have been a further deduction of the costs incurred by car users for inspection of foreign cars not charged back to car owners. The complainants have not seen fit to consider this deduction as part of what they regard as the Commission's formula, approved or prescribed in the 1949 report. They argue:

> It is technically true that the expense is not one which the owner bears immediately and directly but it is one which the owner bears vicariously and by substitution; and nonowners should not be shielded from the impact of this ownership burden.

Applied to the 1952 study the deduction would amount to only about 5 cents per day, a relatively small figure. Nevertheless Commission's reasons for excluding the item seem sound.

The defendants contend that there should be even larger deductions for the expense of car inspection now included in account 314. Some of the defendants would eliminate all inspection costs on the ground, as stated by one of them, that "inspection is obviously primarily for purposes of operation and safety, and with the primary objective of

preventing breakdowns in transportation on the inspecting line, which is the line which is using the cars." Such a sweeping generalization can not be sustained. The instructions published in connection with the accounting classification direct that "the cost of repairs * * * shall include the cost of inspecting to determine the repairs necessary and * * * the cost of inspecting and testing after repairs have been made * * * to determine whether the repairs have been properly made." The cost witness for the short-line parties in effect conceded that inspection costs of this kind may properly be considered maintenance. If there is to be any segregation of inspection costs as between maintenance and transportation, it should follow an authoritative study.

In the 1949 report the Commission said (p. 391):

> Numerous repairs are applied to freight cars when on the lines of railroads other than their owners, and, except for the relatively few due to defects for which the using line is responsible by reason of improper handling, commonly called no-bill repairs, definite sums published in connection with the freight-car interchange rules may be billed against and collected from the owning railroads. Such amounts are revised from time to time, to correspond with changes in labor and material costs, but as the published revisions lag behind changes in price levels, the actual costs, in a period of rising prices, of supplying materials and applying repairs to foreign cars may, and frequently do, exceed the amounts that may be recovered.

Some of the defendants contend here that losses which they and other carriers incur because of their inability to recoup full costs of these repairs both on foreign per diem cars as well as mileage cars should be deducted from the total car repair costs. It is testified for the Boston & Maine that this deficiency is equivalent to nearly 30 per cent of its charges to account 314, and applying this percentage to aggregate car repair costs of $586,914,603 used in the complainant's study, it suggests the elimination of $175,006,186 from that aggregate. It would be very hazardous to make any such adjustment in the absence of fairly complete information bearing on the matter. Other defendants more cautiously suggest only that the situation should be investigated. This attitude seems to be reflected in the recommendation of the Susquehanna that "there should be segregated and eliminated from ownership cost figures all amounts spent by users for the maintenance of cars which are not recoverable by the user from the owner."

The various defendants introduced four cost studies in which the aggregate car-repair figures there shown differ widely. That of the short-line parties shows a total of $498,922,522. The figure in the New Haven study is $457,610,831. Much lower are those of the Boston & Maine, $259,486,694, and of the Susquehanna, $217,158,403. Each of the witnesses who presented these studies is a man of long experience in this field. The wide variations in these figures apparently reflect individual differences in respect of reliance upon conjectural factual data.

Some conjecture of this kind is inescapable because of the comprehensive nature of account 314. It is the largest of the primary operating expense accounts, embracing nearly 10 per cent of total freight expense. It includes "the net loss sustained on account of the destruction of foreign cars" and "amounts paid to others for repairs of freight cars for which the carrier is liable." Among the freight cars covered by the account are cabooses and refrigerator cars. As of November 1, 1953, however, 96.5 per cent of the cars owned by class 1 carriers consisted of box, gondola, hopper, stock, and flat cars, subject to per diem.

The Subcommittee on Mileage and Per Diem in 1951 came to the conclusion that a proper per diem charge could be more readily determined if account 314 could be subdivided and recommended that all the railroads do so beginning with 1952. The Subcommittee found that there was "considerable variation in the practices of various railroads in the charging of inspection costs as between account 314 and account 402." It was of the view that "it would be better if car repairs for cabooses could be eliminated from account 314 and caboose car days eliminated from the freight-car day divisor." The Subcommittee also proposed that there be a separation of repair costs for home cars, foreign cars, and railroad and privately-owned mileage cars, as well as cabooses and a separate showing of cost of classified repairs, running repairs, switching expenses, and credits for sales of scrap. The General Committee disapproved this recommendation because of the additional

expense which would be required for such detailed accounting.

There appears to be good reason for the Commission and the railroads to give careful consideration to the recommendation of the Subcommittee in the interest of removing some of the controversy surrounding this subject. Account 314, as before indicated, includes items of expense which are not related to per diem cars, such as the repairs to cabooses and railroad-owned cars rented on a mileage basis. These expenses should be segregated by special studies currently maintained. However, it is not desirable to delay the decision of this case pending an effort to provide addition data bearing on car repairs. Accordingly, it is concluded that car-repair costs should be determined in the manner specified in the 1949 report.

Taxes—In 1952 the class 1 railroads showed a total investment of $32,698,240,806 in property, material, and supplies, upon which they paid property taxes (personal and real) and other taxes in lieu thereof but excluding State income taxes amounting to $319,221,322, a ratio of 0.976 per cent. That ratio is applied to ledger value of freight cars, undepreciated, and a freight-car repair proportion of ledger value, undepreciated, of shops, enginehouses, etc., producing $56,639,614. To this figure was added $23,354,062 as a proper estimated share of payroll taxes, which makes a total of $79,993,676 for taxes. This is translated into a figure of 14.334 cents per active car day for taxes.

The defendants point out that in some important States no ad valorem taxes are levied on freight cars and make certain other criticisms of the complainants' tax allocations. The Susquehanna suggests that the figure of 14.334 cents "should be reduced by at least 50% pending a country-wide analysis leading to calculations based on accurate comprehensive figures." The Boston & Maine is of opinion that in the light of its experience the property-tax figure of $56,639,614 should be reduced by 70%, making it $16,991,884. The reduction would amount to 7 cents per active car-day.

In the absence of more exact figures the complainants' allocation of this expense appears not to be excessive.

Depreciation—On this subject the complainants say in their brief:

> In the 1948 and 1950 studies, leading to the $1.75 and $2.00 per diem rates, the General Committee used the carriers' aggregate recorded depreciation as the depreciation element of freight car ownership cost. The depreciation item thus reflected freight car value based on original cost. Prior per diem rates had been similarly calculated.
>
> In [the 1949 report] the Commission discussed the contentions of the parties concerning original cost versus replacement value in connection with depreciation and interest return, and its conclusions are reflected in the observation that:

Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values.

In conformity with the foregoing statement the Commission computed both depreciation and interest on the basis of replacement value in the formula appended to its report in the prior case.

* * * the General Committee adopted the principle laid down by the Commission, and calculated the annual depreciation charge on the basis of reproduction value. The difference between using original cost and using reproduction value as the depreciation base * * * is the difference between a cost per day of 30.281 cents and 53.598 cents.

The foregoing constitutes the sole justification offered by the complainants for depreciation based on cost of reproduction. They do not undertake to support their position by citation of court decisions or modern accounting practice.

The short-line parties presented as a witness an experienced certified public accountant, who expressed the opinion that depreciation based on cost of reproduction was not in accord with governmental regulations or recognized accounting practice. That view is supported by the general agreement of economists that the purpose of depreciation accounting is not to provide a fund for the replacement of

units of property being retired but to recover the cost of those units in current use.[2]

The holding of the Supreme Court based on a contrary view in *United Railways* v. *West*, 280 U. S. 234, cited in the 1949 report, was expressly overruled in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, commonly known as the *Hope* case. The 1949 report is unique among Commission decisions in suggesting the desirability of using reproduction cost as a basis for depreciation. The question was considered exhaustively 18 years before in *Telephone and Railroad Depreciation Charges*, 177 I.C.C. 351, 372-382, shortly after the decision in *United Railways* v. *West, supra*. There the rail carriers urged "that the operating expense resulting from the retirement of a unit of property is not its original cost but rather the cost of replacing it in kind." The Commission rejected that view, and its comments at pp. 377-8 are pertinent here:

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[2] See Barnes-The Economics of Public Utility Regulation, p. 259; Troxel-Economics of Public Utilities, p. 337; Thompson & Smith-Public Utility Economics, p. 330.

The New York Public Service Commission very recently rejected a suggested method "to protect equity investors in utilities against the rigors of inflation, the use of depreciation calculated not upon the basis of cost or investment but in dollars adjusted to the same purchasing power of the dollar originally committed to the enterprise." *Re New York Telephone Co.*, 5 PUR 3rd 33, 46.

See also Hills—The law of Accounting, 54 Col. L. Rev. 1, 20 (January 1954). The second installment of this paper contains the most recent discussion of the point, id. 1049, 1077-8, (November 1954).

> When depreciation accounting is employed, a further and important objection to the cost of replacement or present value method is that retirement and replacement of the unit do not occur when the depreciation charge is made, and may not occur until many years in the future. If depreciation charges, therefore, are made each year on the basis of the current replacement cost or present value, they may prove to be quite out of line with this cost or value at the time when retirement actually takes place. In view of the constant shift in such costs and values this would indeed, normally be the case, with the result that the depreciation reserve would be either too large or too small. No very satisfactory method of adjusting these irregularities has been suggested. It would also be necessary for us to exercise constant supervision over the depreciation charges, for the determination of current replacement cost or present value is so controversial a matter that it could not safely be left to the discretion of the carriers.

The last sentence above quoted is an example of general recognition of the fact that cost of reproduction can only be estimated, and the process is inherently difficult, involving many assumptions which are at least open to question. This is true even though the estimates are based as they are here on data obtained from the Commission's valuation records.

In determining depreciation to be considered in arriving at a proper per diem rate the basis should be ledger value in accordance with the generally accepted accounting theory.

Capital Charges—In connection with this element also the use of cost-of-reproduction is a point of controversy. On this subject the Commission in its 1949 report said: (a. 393)

> An appropriate interest rate, if applied to depreciated ledger cost of freight cars, would not adequately compensate car owners, because such value, averaging $1,092 for freight cars in the service of class 1 railroads at the end of 1946, was 42.3 per cent below their estimated value, averaging $1,891, at that period. Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values. Inclusion in the per diem rate of an interest charge of 6 per cent on average present value of freight cars, freight repair shops, et cetera, does not appear to be excessive, in view of the fact that a portion of the resulting revenue must be paid out as income taxes.

The complainants are probably justified in asserting that the Commission "held that interest should be computed at 6 per cent on reproduction value," but they do not consider this to be a mandatory requirement. In their brief they say:

In connection with the $2.40 rate the General Committee's averaging method produced an interest on value item for freight cars of 43.588 cents, as against 31.516 cents on depreciated ledger value alone. If the General Committee had followed the Commission's decision and used depreciated reproduction value, the amount included in the per diem computation for interest on freight car value would have been 55.660 cents, and the current rate would be substantially in excess of $2.40.

The "averaging method" above mentioned produced an investment base which was the average of depreciated cost of reproduction and depreciated ledger value. To this a 6-per cent rate of return was applied. The theory followed in determining this base is essentially the same as that of "fair value" which flourished about 25 years ago but has lost most of its significance since the *Hope* case.[3]

It is true, as complainants say, that the Commission's right to recognize reproduction value is not to be questioned, but the 1949 report in its extreme reliance on present value may properly be characterized as anomalous. Long before the *Hope* case, the Commission in 1927 carefully pointed out the weaknesses of the cost-of-reproduction basis in *Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I.C.C. 3, 28-37. Later in *Petroleum Rail Shippers' Assn.* v. *Alton & S.R.*, 243 I.C.C. 589, 663, the Commission de-

[3] See "The *Hope* Case and Public Utility Valuation in the States (Rose), 54 Col. L. Rev. 188 (May 1954).

termined the value of two pipeline carriers on the basis of original cost less depreciation instead of the lower cost of reproduction. In the general rate-increase cases since 1946 the Commission has adhered to original cost as the principal element in the rate base, *Increased Freight Rates*, 1947, 270 I.C.C. 403, 436; *Increased Freight*, 1951, 284 I.C.C. 589, 607. Even more pertinent here is the decision in *New York, S. & W. R. Co. Abandonment*, 275 I.C.C. 10, in which there was an issue of just compensation to the Susquehanna for transportation service which it performed for the New York Central. At p. 16 of that report the Commission said:

> The Susquehanna maintains that reproduction cost at present-day prices, less depreciation, provides a more fair and equitable basis for determining a fair return on value than original cost less accrued depreciation. The Central insists that the latter factors should be used * * * We likewise consider original cost less depreciation as the most suitable base for the purpose of this case. In any future revisions of the cost study, such base could be quickly and inexpensively determined.

The last sentence above quoted recognizes the fact already pointed out that cost of reproduction is an unstable and indefinite base not readily ascertainable. This objection is sufficiently forceful in itself to justify the sole use of depreciated ledger value as an investment base for present purposes without considering other criticisms of the cost-of-reproduction basis which have caused it to be discredited in the past 10 years.

The choice of a percentage figure to be applied to the investment base must rest necessarily on judgment in a field which has been a battleground of controversy for about half a century. Although all the defendants take much the same position as the Boston & Maine, which asserts that "it would be improper to include anything in the rent base beyond the costs of financing such property—in this instance the interest burden upon a car owner arising out of his acquisition and ownership of a freight car," the only ones making definite recommendations as to a rate of return are the New Haven, the Boston & Maine, and the Susquehanna. The first-named suggests 6 per cent based on ledger value, but the other two say it should be about 4.6 per cent of that value. The latter figure is the result of an averaging process, reflecting among other things the average interest rate of 2.39 per cent on outstanding equipment-trust obligations.

In urging that "the General Committee's formula conservatively understates the legally allowable charge for depreciation and interest return as elements of ownership cost", the complainants stress "risk of ownership" and "burden of replacement" incurred by the car-owning carriers and hint at danger to the national economy "if railroads which have heretofore been willing to sink capital in freight cars should decide that in view of high replacement costs prudence no longer permitted them to contribute their part to the national car fleet, but that they should become car renters rather than car owners."

An intervener, the Chesapeake and Ohio Railway Company, which owns a large number of cars and is consequently one of the principal per diem credit railroads is more specific. It states:

> If the railroads in general, and the Chesapeake and Ohio in particular, are to own the number of cars required by the national economy, the per diem rate must provide adequate compensation after income taxes. If the per diem rate provided a realistic rate of return after income taxes, the railroads, including the Chesapeake and Ohio, would own a larger number of cars and could, in fact, justify increasing rather than reducing their car ownership.

This intervener therefore believes that, far from being reduced, "the prevailing per diem rate of $2.40 per car per day is at least 97 cents too low and should be increased." The further expansion of the 97-cent figure which it suggests would be accomplished by adjustment of the car-day divisor to be discussed later.

Argument over investment base and percentage rate of return should not obscure the practical point involved, which is the number of dollars available by way of rental to a carrier which makes an investment in freight cars for joint use in nationwide transportation service. It seems clear that the car-owning carrier is entitled to a return larger than one based solely on cost of money measured by current interest rates, for in acquiring cars it acts somewhat as an entrepreneur. It must assume the burden of planning and financing the new equipment in the light of

an uncertain demand for cars in general or those of a particular size and type due to unpredictable factors affecting the outlook for rail transportation. In other words, it is not disputed that the per diem charge should take some account of what are termed incentive and risk, but the problem of proper allowance for this consideration is difficult. The appropriate place for such an element, it is believed, is in the rate of return without dividing it between that item and the depreciation charge. Also it seems that the defendants are right that the incentive to build new cars will have more force if rate of return is based on original cost.

Another complication has to do with the impact of income taxes. At a time when such taxes were comparatively trivial, the Supreme Court held that the fairness of a return to a utility should be determined on the basis of what it had left after paying income taxes. The validity of this principle is subject to doubt in the present era of high income taxes,[4] but the Commission gave some weight to income tax liability in the 1949 report.

The six-per cent return on depreciated reproduction value, strongly suggested as proper in that report, was equivalent to a return of approximately 10.6 per cent on depreciated original cost. This return, as the Commission pointed out, would be reduced by income taxes. In the instant case it is concluded that a return of 10 per cent

[4] In Justice Douglas's dissenting opinion in *Vinson* v. *Washington Gas Co.*, 321 U. S. 489, he said: "It is self-evident that the ability to pass present wartime income taxes on to others is a remarkable privilege indeed."

on original cost of freight cars less depreciation would be fair. This would produce a greater amount of money than the allocation for interest in the complainants' studies, but the excess would be much less than the reduction in the allocation for depreciation recommended in this report. Thus the total amount allocated for depreciation on freight cars and interest on the value thereof in complainants' 1952 study is $542,366,675. The corresponding allocation upon the basis here proposed is $462,120,718. On the basis suggested in the 1949 report the allocation for these items would be $609,736,258.

In this report the return on investment in shops, engine-houses, power plants, etc., is based on 6 per cent of depreciated ledger value. This item is relatively unimportant.

The Car-Day Divisor—For reasons which are well-known it is generally agreed that surplus and unserviceable cars should be excluded in computing average costs per car day. However, since per diem charges are established for future application, the extent of that exclusion necessarily rests upon an informed guess as to the aggregate number of freight cars which the railroads will own in an indefinite future period, the number which will be unserviceable, and the number which will be idle because of insufficient traffic for their full utilization. The last element, which is closely related to fluctuations in the business cycle, is particularly speculative. Hence the basis of estimating the percentage of active car-days has always been a subject of wide disagreement. The Commission devoted three pages of its 1949 report to this question, and following paragraph on p. 389 indicates its conclusions:

The per diem rate could be revised upward and downward periodically to conform to annual fluctuations in the number of active cars, and if based on the approximate costs of ownership and maintenance and active cars for a designated recent year it could not be said to be unreasonable. Or the rate could be determined by the use of an active-car ratio based, from time to time, on the average number of active cars in use over a representative period of years, and, if predicated on the approximate costs of ownership and maintenance for a designated recent year, the rate so fixed could not be said to be unreasonable. Stated differently, there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate. The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10, or 15 years.

It does not appear that theretofore the railroads had ever considered using a period as long as 20 years for this purpose. In the studies which the AAR presented in connection with the 1949 decision a 10-year period, 1936-1945, was used, and the ratio so arrived at was 86.15 per cent. The 20-year period in the 1949 report covered 1927-1946 and produced a ratio of 80 per cent, the ratio used by the Commission in its "reallocated" costs, which as before shown, were higher than those relied on by the AAR.

Notwithstanding the fact that the Commission's conclusions with respect to the car-utilization ratio were of much potential value to the car-owning railroads, they were not immediately adopted. In the studies which led to the $1.75 charge a period of 15 years, 1934-1948, was used to arrive at a ratio of 86.12 per cent. Originally in the next studies relating to the $2 charge the 15-year period, 1936-1950, was used, and the resulting ratio was 89.13 per cent. However, apparently the General Committee was of the view that due deference to the Commission's views made it advisable to use the 20 years 1931-1950 and thereby reduce the ratio to 82.75 per cent, incidentally increasing the estimated cost by about 15 or 16 cents per day. In the studies on which the present charge was based a 20-year period, 1933-1952, was used, giving a percentage ratio of 86.05 per cent,

In contrast to the ratios above shown, 86.12, 82.75, and 86.05 per cent, are the following actual ratios for the years shown:

Year	*Per cent*
1949	90.39
1950	91.34
1951	94.27
1952	93.59

If the Commission's observations concerning the 20-year period were intended as a general principle for future guidance of the railroads, the present proceeding affords an appropriate opportunity for further consideration of the question. The period gives undeserved weight to condi-

tions in years prior to 1941 which were in a wholly different economic era from that of succeeding years.

For the period from 1933 to 1940, inclusive, the average annual ownership of cars by class 1 railroads was 1,806,065. Because of depressed industrial activity there were large numbers of surplus cars, and the percentage of unserviceability ranged from 8.8 to 15. The car-utilization ratio consequently ranged from 63.98 in 1933 to 84.16 in 1940.

On the other hand, in the years from 1941 to 1952, inclusive, the class 1 railroads' annual ownership of cars averaged 1,738,696. Those carriers were able to carry the heavy traffic of the war and post-war periods because of the greater average capacity of the cars increased train speeds and other means of greater efficiency, including a reduction in percentage of unserviceability to a range between 2.7 and 6.9. Car surpluses after 1940 were negligible in comparison with those of the earlier period.[5] The car-utilization ratio, therefore, between 1941 and 1952 ranged between 90.39 and 96.67. In 1952, the latest year for which figures are to be found in the record, the ratio was 93.59, as before shown. Although the ratio undoubtedly declined in 1953 and 1954, it is doubted whether the

5 Complainants show that maximum freight-car surpluses in 1933-1940 ranged from 490,370 on March 14, 1940 to 691,587 on January 31, 1933. Minimum surpluses in the same period ranged from 64,209 on October 14, 1939 to 385,137 on October 31, 1933. In the period 1941-1952 maximum surpluses ranged from 23,416 on October 20, 1945 to 207,627 on November 5, 1949. Minimum surpluses ranged from 673 on October 23, 1948 to 38,511 on October 4, 1941.

figure has fallen below 90. If so, supplementary figures may be furnished before submission of the case.

The mere fact that freight cars have an average life of about 20 years affords little or no ground for assuming that their probable utilization in any given future year will be the same as that for the average of the past 20 years. There is no reason to believe that economic cycles are so marked.

If the 20-year period is adopted as a permanent yardstick, the statistics for years from 1941 to 1952 will continue to have a varying influence until 1971. Within that future time there may well be changes which will cause the 1941-1952 period to be regarded as abnormal. By 1960 when the favorable influence of the prewar years will have entirely disappeared there may be less satisfaction with the 20-year yardstick.

For the reasons above indicated it is here concluded that that yardstick should be discarded. The proposed findings therefore reflect a car-utilization ratio of 90 per cent.

Conclusions—In accordance with the views before expressed the figures submitted by the complainants have been modified in the following respects: (1) The item for freight-car repairs and the allocations based thereon are treated in the same manner as they were in the 1949 report. (2) Depreciation for freight cars and shops, enginehouses, power plants etc., is based on undepreciated ledger values. (3) Return on investment is based on 10 per cent of depreciated ledger value. (4) Return on investment in shops, enginehouses, power plants, etc., is based on 6 per cent of depreciated ledger value. (5) The car-day divisor is based

on a car-utilization ratio of 90 per cent. The figures as so modified are as follows:

ESTIMATED AVERAGE COSTS PER ACTIVE CAR-DAY[6]

	1948	1950	1952
	Cents	*Cents*	*Cents*
Cost of freight-car repairs	70.01	74.06	88.42
Deadhead haulage of freight-car repair material	2.03	2.13	2.54
Charges to depreciation of freight cars	24.28	26.86	28.84
Charges account of maintenance and depreciation of shops	6.03	5.46	6.18
Miscellaneous maintenance of equipment accounts	4.69	5.48	6.67
Allocated proportion of general expense	3.20	3.58	4.48
Interest on freight-car value	39.46	41.19	50.03
Interest on value of repair shops	2.24	2.29	2.30
Interest on investment in stock of freight-car repair material	0.50	0.53	0.63
Interest on working capital	0.47	0.50	0.60
Cost of certain taxes	10.89	11.68	13.29
Totals	163.80	173.76	203.98

[6] The working papers underlying these computations are available for inspection in the office of the Cost Finding Section of the Commission's Bureau of Accounts Cost Finding and Valuation.

Additional labor, material and payroll taxes to reflect increased cost levels as of May 1, 1949 and wages of January 1, 1949	4.96		
Same as of April 1, 1951		12.07	
Same as of April 1, 1953			1.81
	168.76	185.83	205.78

Car ownership adjusted to car utilization ratio of 90 per cent:

1948—583,286,368 car days
1950—578,535,476 " "
1952—585,970,978 " "

As before stated, the Susquehanna refused to pay the charge of $1.75 after April 1, 1951, and it is therefore unnecessary to consider whether the charge was unreasonable before that date. The table above shows a cost of $1.8583 as of April 1, 1951, and therefore indicates that the charge of $1.75 from that date to April 30, 1952, was not unreasonable. Similarly, the table indicates that the average cost in 1952 and 1953 was at least $2.0398, which was slightly higher than the charge of $2 in effect during the greater part of those years. The present charge of $2.40 is considerably higher than the cost of approximately $2.06 shown in the table, and it is therefore concluded that a reasonable charge under present conditions would be $2.10.

The Susquehanna in its requested findings suggests that there is a "zone of reasonableness" sufficiently wide to include the amounts for which it seeks approval as not "unjust or unreasonably low or noncompensatory for the periods of their effectiveness, and were within the zone of reasonableness. Although the Commission at p. 389 of the 1949 report said that "there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate," the statutory authority of the Commission over per diem rates is not so worded as to indicate that the authority may be exercised merely by defining the upper or lower limits of a zone of reasonableness, as in the case of freight rates.

The Commission should find and declare that the per diem charges of $1.75 *and* $2 *were reasonable during the periods in which they were effective and that a reasonable charge for present use would be* $2.10.

A declaratory order should be entered.

APPENDIX

Interveners in support of Complainants—The Chesapeake and Ohio Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Delaware and Hudson Railroad Corporation; the Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Louisville and Nashville Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Northern Pacific Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Texas and New Orleans Railroad Company; Western Maryland Railway Company.

Interveners in support of Defendants—The Ahnapee and Western Railway Company; Alexander Railroad Company; The Atlantic and Danville Railway Company; Bamberger Railroad Company; Bath and Hammondsport Railroad Company; Beaufort and Morehead Railroad Company (A. T. Leary, Lessee); Belfast and Moosehead Lake Railroad Company; Butte, Anaconda & Pacific Railway Company; Charles City Western Railway Company; Chattahoochee Valley Railway Company; Chesapeake Western Railway; Chicago, West Pullman & Southern Railroad Company; City of Prineville Railway; Craig Mountain Railway Company; Detroit and Mackinac Railway Company; Escanaba and Lake Superior Railroad Company; Flemingsburg and Northern Railroad Company; Fort Dodge, Des Moines & Southern Railway Company; Genesee and Wyoming Rail-

road Company; Georgia, Ashburn, Sylvester & Camilla Railway Company; The Georgia Northern Railway Company; Hampton & Branchville Railroad Company; High Point, Thomasville & Denton Railroad Company; Howard Terminal Railway; Jerseyville & Eastern Railroad Company; Kentucky and Tennessee Railway; Lackawanna and Wyoming Valley Railroad Company (E. McLain Watters, Trustee); Lake Erie, Franklin & Clarion Railroad Company; Lakeland Railway; Live Oak, Perry & Gulf Railroad Company; Maryland and Pennsylvania Railroad Company; Minneapolis, Northfield and Southern Railway; Morehead and North Fork Railroad Company; The Narragansett Pier Railroad Company, Inc.; Nelson & Albemarle Railway Company; Norwood & St. Lawrence Railroad Company; Oregon & Northwestern Railroad Co.; Oregon Pacific and Eastern Railway Company; Paris and Mt. Pleasant Railroad Co.; Pearl River Valley Railroad Company; The Pittsburg & Shawmut Railroad Company; Rahway Valley Company (Rahway Valley Company, Lessee); Roscoe, Snyder and Pacific Railway Company; St. Marys Railroad Company; San Francisco and Napa Valley Railroad; The San Luis Central Railroad Company; Santa Maria Valley Railroad Company; Savannah & Atlanta Railway Company; The South Georgia Railway Company; Tennessee, Alabama & Georgia Railway Company; Trona Railway Company; Ventura County Railway Company; Virginia Blue Ridge Railway; Washington and Old Dominion Railroad; Washington, Idaho & Montana Railway Company.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY ET AL.

Decided October 17, 1955.

Per diem charges of $1.75, $2, and $2.40 for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found not in excess of reasonable compensation. Proceeding discontinued.

S. R. Brittingham, Jr., R. R. Bongartz, Carson L. Taylor, J. P. Fishwick, L. J. Huegel, F. E. Baukhages, C. C. Howell, R. B. Gwathmey, E. H. Burgess, D. O. Mathews, Eldon Martin, Edwin C. Matthias, D. S. Wright, B. J. Viviano, Thomas T. Railey, H. Merle Mulloy, J. L. Homire, Seddon G. Boxley, J. T. Suggs, W. C. Plunkett, E. S. Davis, J. H. Miller, J. L. Rice, A. C. Scott, R. S. Outlaw, J. H. Wright, E. J. Zoll, Jr.,

J. Carter Fort, Jr., Alfred W. Hesse, Jr., Martin A. Meyer, Jr., and *George W. Holmes* for complainants.

Hewitt Black, J. C. Kauffman, David L. Farley, Jr., Ross L. Thorfinnson, W. H. Parsons, Prime F. Osborn, III, Thormund A. Miller, M. C. Smith, Jr., Robert D. Brooks, John Colgren, Kemper A. Dobbins, Warren H. Ploeger, W. H. Fitzpatrick, John F. Reilly, Paul F. Robinson, Martin L. Cassell, Eaton Adams, Francis J. Melia, D. D. Dart, M. L. Countryman, Jr., Matthew Crawford, and *Milton Ferguson* for interveners in support of complainants.

Carl E. Newton, Granville Whittlesey, Jr., W. J. Hickey, J. M. Hood, J. W. Grady, W. J. Mykowski, H. D. Boynton, Richard Jackson, Lawrence Chaffee, William A. Colton, Richard Swan Buell, and *Joseph P. Hawrylak* for defendants.

W. J. Hickey for interveners in support of defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner, and replies thereto, were filed by the parties, except interveners listed in the footnote.[1] We have heard oral argument. Our conclusions differ in part from those of the examiner. Exceptions and requested findings not specifically discussed

[1] The following carriers intervened in support of the complainants but did not join in their exceptions: Erie Railroad Company, Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, Southern Pacific Company, Texas and New Orleans Railroad Company, Western Maryland Railway Company, and The Pittsburgh & Shawmut Railroad Company.

in this report nor reflected in our findings or conclusions have been considered and found not justified.

This complaint was filed on September 21, 1953, by 19 of the larger class I railroads.[1] The defendants include, among others, 5 class I railroads: Boston and Maine Railroad; The Long Island Railroad Company (William Wyer, Trustee), called the Long Island; The New York, New Haven and Hartford Railroad Company, called the New Haven; New York, Susquehanna & Western Railroad Company, called the Susquehanna; and Rutland Railway Corporation. Six short line railroads are also defendants: Atlantic & East Carolina Railway Company; Barre and Chelsea Railroad Company; East Tennessee and Western North Carolina Railroad Company; St. Johnsbury & Lamoille County Railroad; The New Jersey and New York Railroad Company (Horace Banta, Trustee); and Mississippi & Skuna Valley Railroad Company. The last-named defendant is a class III railroad; the preceding 5 are class II lines.

There are 15 interveners in behalf of the complainants, all of them being class I railroads. The interveners in be-

[1] The Atchison, Topeka and Santa Fe Railway Company, Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Chicago & Eastern Illinois Railroad Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Great Northern Railway Company, Gulf, Mobile & Ohio Railroad Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), Norfolk and Western Railway Company, The Pennsylvania Railroad Company, Reading Company, The St. Louis-San Francisco Railway Company, Southern Railway Company, The Texas and Pacific Railway Company, The Virginian Railway Company, and Wabash Railroad Company.

half of the defendants, 56 in number, are rail carriers principally in classes II and III. All of the interveners are listed in the appendix hereto.

The complaint grows out of a disagreement between the complainants and the defendants concerning the reasonableness of per diem charges for the use of railroad owned freight cars payable by nonowning railroads. In *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383, decided July 11, 1949, hereinafter referred to as the 1949 report, we found that the per diem charge of $1.50 per day then in effect was not shown to be either unreasonably high or unreasonably low. Effective on November 1, 1949, that charge was increased to $1.75 by action of members of the Association of American Railroads, hereinafter called the AAR, under procedure described in the 1949 report.

The procedure for establishing per diem charges was considered by division 2 in *Association of American Railroads Agreement*, 277 I.C.C. 413, and approved as conforming to section 5a of the Interstate Commerce Act. The report included the following paragraph:

> Articles XI and XII accord to each subscriber certain individual rights. The former states that the agreement shall not be construed to prevent or limit recourse to this Commission by any subscriber for any relief (in pending proceedings, or otherwise) accorded by law in respect of any of the matters covered thereby. The latter (article XII) provides that all subscribers shall have the free and unrestrained right to take independent action either before or after any determination arrived at though the procedure provided for in the agreement.

This agreement became effective on October 7, 1950. Under the procedure which it set up the per diem charge was increased to $2, effective on May 1, 1952, and to $2.40 on August 1, 1953.

The Susquehanna, which was not a party to the agreement, notified the complainants in March 1951 that after April 1 of that year it would refuse to pay the charge of $1.75 but would settle on a graduated scale ranging from $1.20 to $2, depending on the age of the car. In 1953 it offered to increase that scale to a range between $1.33 and $2.21. The complainants refused those offers, and the car rentals payable by the Susquehanna are now involved in a number of pending lawsuits.

In June 1953 the Boston & Maine, the New Haven, and the Rutland gave notice of their refusal to pay the charge of $2.40, as well as the former $2 charge after July 31, 1954. Later, the Boston & Maine offered to pay on a graduated basis or a flat rate of $1.72 per day. The Long Island in August 1953 advised that it was willing to continue paying a $2 charge but would not recognize the $2.40 charge. The Atlantic & East Carolina, St. Johnsbury & Lamoille County, New Jersey & New York, and Barre & Chelsea have followed a similar course. The situation with respect to present payments by the defendants other than those here named is not disclosed.

It is alleged in the complaint that, to the extent that the defendants have paid and are paying or offering to pay charges less than those generally in effect as above indicated, "such payments have been, are and would be unjust, unreasonable and noncompensatory, in violation of para

graphs (4), (10), and (11) of section 1 of the Act; and such action by defendants has been, is and would be disruptive of the 'uniform national basis' of handling per diem, which has been deemed necessary by the Commission in order to facilitate 'the performance of orderly transportation service by railroad in the public interest.' *Association of American Railroads—Agreement, supra*, 423." The prayer of the complaint is that

> the Commission find and declare that the per diem rates of $1.75 and $2, during the periods in which these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that the Commission grant such other and further relief as may be required in the premises.

The complainants expressly disclaim any intention to invoke the only specific power with respect to per diem which we have, namely, in section 1 (14)(a) of the Interstate Commerce Act to establish "the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier, * * *." Such action would involve the entry of an order, which presumably would continue in effect for the indefinite future and, unless it were vacated or modified, would render the present procedure for dealing with per diem charges inoperative.

In one of the complaints considered in our 1949 decision, No. 29587, the complainants, which were short-line railroads, asked that we promulgate a formula to be employed in the future in determining the lawful compensation to be paid for the use of railroad-owned freight cars. The pleadings in the instant case raised no such issue.

In a joint answer to the complaint filed by the Boston & Maine, the New Haven, and certain short-line defendants, these parties ask "that the Commission find and determine and fix by order the rate or rates for the use of freight cars to be paid by complainants to defendants and by defendants to complainants." The short-line defendants and intervenors requested in their briefs that we determine and definitely fix the amount of compensation to be paid by a rail carrier when it uses the freight cars of another; but the briefs of the other defendants were less positive.

The New Haven and the Boston & Maine asked for a declaration that the present per diem rate is unlawful and as a maximum should not be more than $1.04 per day if it is to be fixed as a single amount. Alternatively, they expressed preference for a graduated scale. The Susquehanna asked principally that the graduated scale which it favored be found not unreasonably low or noncompensatory. The Long Island and the New Jersey & New York urged that the complaint be dismissed, and asserted that we are not empowered to prescribe charges for car hire retroactively.

In their exceptions to the proposed report, the defendants generally go beyond the positions taken in their briefs above described, and request that a formula for the determination of per diem charges be prescribed. Under such a formula,

according to one of the defendants, "the carriers would be required to get exact and complete figures and to make the computations themselves, with the right of recourse to the Commission in the event an agreement could not be reached." This contention is outside the scope of the proceeding as developed in the pleadings, and such a disposition would hardly be desirable except in a proceeding to which all rail carriers were parties.

At a prehearing conference it was suggested that findings such as those sought by the complainants might be in the nature of a declaratory order, as authorized by section 5(d) of the Administrative Procedure Act. Later, some of the defendants, as above pointed out, made requests for findings which appeared to be of the same nature. In exceptions to the proposed report, which recommended action under that section, the defendant New Haven questions the applicability of a declaratory order to the present controversy.

The declaratory order is a relatively new administrative remedy, and no definite limits to its use as yet have been set. The power of issuance is committed to the agency "in its sound discretion . . . to terminate a controversy or remove uncertainty." Manifestly, a controversy exists here, and we consider that a declaratory order would be appropriate.

With the exception of our decision in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, which was set aside on judicial review (*Palmer* v. *United States*, 75 F. Supp. 63), we have never undertaken to establish a general basis of per diem charges under our authority in section 1(14)(a)

of the act, but have considered such charges in a number of cases arising on formal complaints. The present system of rentals in its broad form has been worked out by the railroads themselves. The per diem plan was adopted in 1902 after a mileage system was found to be unsatisfactory for reasons mentioned in *Rules for Car-Hire Settlement,* 160 I.C.C. 369, 375. The charge has been uniform for all types of freight cars, and up to the time of the present controversy it has applied uniformly to all railroads, subject to the operation of reclaims. In our 1949 report (page 386), we said:

> For many years the per diem rate has been based on average costs. The daily rental for a car valued at $2,000, for example, is the same as that for a car worth twice as much. There is no request herein for different per diem rates on freight cars of different ages, sizes, or classes. A carrier which has a foreign railroad car on its rails immediately after midnight pays the rental for that calendar day in the absence of some special agreement. If it receives a car in interchange after midnight and delivers it in interchange before the following midnight, it does not pay any car rental.

Some of the defendants here question the principle of uniformity and introduce evidence in support of their views. These will be discussed before the main issues in the case are considered.[1]

[1] Both the Long Island and the New Jersey & New York, whose lines are partly in the metropolitan area of New York City, perform comparatively short line hauls in their freight service. The average detention per car in their

terminals is high. These defendants believe that the basis of per diem charges should take into account a distinction between items of car-ownership cost attributable to movement use (mileage) and those related to the passage of time. They therefore suggest a basis under which "each using road would pay time costs in proportion to the time that it holds the car and mileage costs in proportion to its own mileage use of the car."

Unless we dismiss the complaint, the Long Island and the New Jersey & New York urge that we

> (a) undertake to determine true freight car ownership costs * * *; (b) make an accurate separation of such costs between time and mileage; (c) determine separate average unit costs for time and mileage; and (d) fix separate car hire charges for each user road reflecting the average time and mileage costs for which such road is responsible.

Admittedly, such a determination could not be made from the evidence in this case; moreover, it would involve a long and complicated statistical undertaking. If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling per diem accounts.

The New Haven and the Boston & Maine suggest a plan of per diem charges under which there would be a variation of rates with respect to owner railroads based on the average age of their cars. The Susquehanna also supports this suggestion. According to the sponsors, this plan "by giving higher rent for new than for old cars would furnish

an incentive to car owners to renew the fleet and to get rid of old equipment." The steps necessary to carry out the plan are stated as follows:

> Mr. Glacy's program assumed that in each year the AAR would ascertain for each owning railroad the inventory of its cars; ascertain for each group of cars of each railroad the proper charge per day; and derive for each railroad a composite figure which was the weighted average rate per day for its entire fleet. The AAR would then publish a booklet showing each owning railroad's composite rate, which would be the basis.

This plan, too, would necessitate a complicated statistical operation to ascertain the proper composite figure, and it may well be doubted whether the clerical labor required in computing per diem credits would be as simple as the sponsors believe.

As above indicated, the suggested plans for varying per diem charges could not be put into effect without an extensive investigation either by this Commission or by the AAR. The facts and arguments here presented are not persuasive that plans of this kind are desirable.

There is general agreement that car rentals, however established, should be reasonably compensatory and no more. *Palmer v. United States*, *supra*, page 69. The determination is basically a problem in cost accounting. The earliest attempt to deal exhaustively with the problem was made 45 years ago by the so-called McCrea Commission, composed of 5 railroad presidents. They adopted the prin-

ciple that the per diem charge should cover repairs, taxes, depreciation, interest on investment, and miscellaneous expense incidental to ownership. This principle has been generally accepted as valid ever since, but there has been continuing controversy as to how it should be applied. Indeed, the members of the Meyer Commission themselves reached three different conclusions on that point.

The principle just referred to serves as a guide for the General Committee of the AAR, which is charged with studying proposals for changes in per diem rates, aided by a subordinate special committee, known as the Subcommittee on Mileage and Per Diem. Costs are allocated to the various categories from expense figures reported to the committees in response to questionnaires sent to car owning railroads. The General Committee alone decides what proposed changes in the per diem rate shall be recommended to the Board of Directors of the AAR for submission to subscribers to the per diem agreement.

In the 1942 report, we discussed the allocations of costs for 1940 presented in support of the per diem charge of $1.50 there in issue. We criticized some of the allocations as too large, but in respect of other important items we made comments which have been interpreted as finding that those items were understated.

In that report, however, we dismissed the complaint in No. 28087, filed by the short lines, in which we were asked, among other things, "to promulgate a formula to be employed in the future in determining the lawful expense

tion to be paid for the use of railroad owned freight cars. Also, we dismissed the complaint in No. 29731, in which 6 large western rail carriers took the position that the per diem charge of $1.80 was "inadequate, unjust, and non-compensatory."

In this case the complainants seek findings which would approve all per diem charges established after the base period. In each instance the General Committee studied statistics reported by class I railroads in response to questionnaires. Those upon which the charge of $1.75 was based were for 1948, but there was an adjustment to reflect wage rates, material prices, payroll taxes, and other determinable increases up to September 1, 1949.

The statistics pertaining to the $2 charge were those for 1951, projected to include cost levels as of April 1952. Full compensation was thus given for the 40 hour week, which was in effect throughout 1952. The present charge of $2.10 was based on figures for 1953. The information for the latter case was received from 131 railroads, but no appearance made at the freight-car ownership of class I railroads concerning the basis of study, the complainants' principal witness asserted that it "came closer to applying the Commission formula [1949] to cost than any of its previous studies leading to a per diem adjustment."

Repair expenses. This is the largest single category of expense included in the per diem charge and amounts to about 40 per cent of the total. Also, it is usual as a basis of allocating certain other costs. The basic factors for this

item are derived from account 314, Freight Train Car Repairs, in the accounting classification. The reported total for 1962 was $580,914,603. To this, the General Committee added $24,865,504 for switching home freight cars marked for repairs, and deducted $63,887,934 for costs of car owners' repairs to foreign cars damaged by them through improper handling, compensation for foreign cars destroyed on car owners' lines, certain switching costs, and a portion of labor costs of inspection and other service at terminal junction points. The reasons for these adjustments were stated on pages 490 and 491 of the 1940 report. The complainants thus estimate the cost of repairs at 92.86 cents per active car day.

In the 1940 report we found that there should have been a further deduction of the costs incurred by car owners for inspection of foreign cars not charged back to car owners. Applied to the 1962 study, the deduction would amount to only about 4 cents per day, a relatively small figure. The complainants have not seen fit to consider this deduction as a part of what they regard as our formula, approved or otherwise, in the 1940 report. They argue:

> It is technically true that the expense is not one which the owner bears immediately and directly but it is one which the owner bears vicariously and by subterfuge, and nonowners should not be shielded from the impact of this nonexistent burden.

The defendants contend that there should be even larger deductions for the expense of car inspection now included

to account 314. Some of the defendants would eliminate all inspection costs on the ground, as stated by one of them, that "inspection is obviously primarily for purposes of operation and safety, and with the primary objective of preventing breakdown of transportation on the inspecting line, which is the line which is using the cars." Such a sweeping generalization can not be sustained. The instructions published in connection with the accounting classification direct that "the cost of repairs * * * shall include the cost of inspecting to determine the repairs necessary and * * * the cost of inspecting and testing after repairs have been made * * * to determine whether the repairs have been properly made." The cost witness for the short line carriers testified that inspection costs of this kind [illegible] inspection costs [illegible] inspection [illegible] inspection [illegible] [illegible] [illegible]

to price levels, the actual costs, in a period of rising prices, of supplying materials and applying repairs to foreign cars may, and frequently do, exceed the amount that may be recovered.

Some of the defendants contend that losses which they and other carriers incur because of their inability to recoup full costs of these repairs, both on foreign per diem cars and on mileage cars, should be deducted from the total car repair costs. It is testified for the Boston & Maine that this deficiency is equivalent to nearly 30 per cent of its charges to account 414 and applying this percentage to aggregate car repair costs of $[illegible] used in the complainants' study, it suggests the elimination of $[illegible] from that aggregate. It would be very hazardous to make such a deduction in the absence of fairly complete information bearing on this suggestion. Other defendants more cautiously suggest only that the situation should be investigated. The attitude seems to be reflected in the recommendation of the Susquehanna that "there should be segregated and eliminated from owner-repair figures all charges that may be [illegible] for the maintenance of cars which are not recoverable by the user from the owner."

The various defendants introduced four cost studies in which the aggregate car repair figures there shown differ widely. That of the short line parties shows a total of $[illegible]. The figure in the New Haven study is $[illegible]. Much lower are those of the Boston & Maine, $[illegible], and of the Susquehanna, $[illegible]. Each

That question was resolved together with the closely related element of interest return, when we stated in the 1949 report as follows:

> Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values.

Thus, both interest and depreciation, excepting a minor item of depreciation on fixed facilities, were calculated on the basis of reproduction cost for the purposes of determining a reasonable per diem charge in the 1949 proceeding.

Reviewing the matter for the purposes of this proceeding we note from the evidence now before us that the present day prices are still well above the levels of an era when many of the cars were purchased. Data of record show a range of freight car prices from 1938 to 1952, from $2,069 to $5,859 for box cars and $2,278 to $5,811 for gondola and hopper cars.

A witness for the short lines expressed the opinion that depreciation based on cost of reproduction was not in accord with governmental regulations or recognized accounting practice. That opinion is supported by some accountants and economists who believe that the purpose of depreciation accounting is not to provide a fund for the replacement of units of property being retired, but rather to recover the cost of those units in current use. In their exceptions to the proposed report, the complainants and the interveners which support them put much emphasis on

views of a group of recent writers in the field of public
lity regulation which "recognizes the unreality of origi
cost valuation and believes that something should be
e about it." Some of these writers have suggested an
ated a basis sometimes called economic or value de
ciation.

United Railways v. *West*, 280 U.S. 234, cited in our
report, the Supreme Court held that an allowance for
ual depreciation should be based on present value and
on cost. That decision was overruled by the Court in
eral Power Com. v. *Hope Natural Gas Co.*, 320 U.S.
commonly referred to as the *Hope* case. Shortly after
at decision we had occasion to consider the question
ephone and Railroad Depreciation Charges, 177 I.C.C.
382. There the rail carriers urged "that the oper
expense resulting from the retirement of a unit of
erty is not the original cost but rather the cost of
acing it in kind." Our comments, at pages 377 and 378,
as follows:

When depreciation accounting is employed, a further
nd important objection to the cost of replacement or
present value method is that retirement and replace
ent of the unit do not occur when the depreciation
harge is made, and may not occur until many years in
e future. If depreciation charges, therefore, are made
ach year on the basis of the current replacement cost
present value, they may prove to be quite out of
e with this cost or value at the time when retirement

actually takes place. In view of the constant shift in such costs and values, this would indeed normally be the case, with the result that the depreciation reserve would be either too large or too small. No very satisfactory method of adjusting these irregularities has been suggested. It would also be necessary for us to exercise constant supervision over the depreciation charges, for the determination of current replacement cost or present value is so controversial a matter that it could not safely be left to the discretion of the carriers.

We realize that in determining depreciation the prevailing accounting practice is to use the ledger value, and we are not here concerned with the propriety of that practice. Our problem here is to determine the justness and reasonableness of the per diem rates in effect during the respective periods referred to and, at present. In reaching such a determination we would be less than realistic if we failed to take into consideration, as pointed out in the 1949 report, that carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values. Failure to do so would cast an undue burden upon the car owners and favor unduly those who pay rentals.

In a special study such as is involved here we may consider the annual depreciation charges on freight cars for any given year, say 1952, which result from a normal application of the average prescribed rate to undepreciated

dger value, and also bear in mind the replacement cost
el. A ready device or tool for use in measuring the
rtcomings of normal depreciation charges, from the
ndpoint of replacement, exists in our own reproduction
t new figure at the 1952 spot price level. These figures,
ich are of record, show an index relation of the repro-
tion cost new value of freight cars as of December 31,
2, $9,587,048,000 (replacement in kind), to ledger value,
$16,365,331 (original cost), of 177. We may apply this
io to the normal depreciation charges to bring them up
hat level, which would embrace replacement considera-
ns, or we may simply apply the average depreciation
to the reproduction cost new value with, of course,
same result. Applying the 1952 average depreciation
of 3.12 per cent to the reproduction cost new total of
$7,048,000 results in depreciation charges of $299,
898.

or the foregoing reasons, we are persuaded that in
rmining depreciation to be considered in passing upon
ompensatory character of per diem charges, the basis
ld be the undepreciated reproduction value.

pital charges. With respect to this element, also, the
cost and reproduction is in controversy. In our 1949
t (page 393) we said:

The short line complainants contend that any inter-
st charge on the value of freight cars, repair shops, et
etera, should be based on depreciated ledger cost.
Certain other carriers urge the use of depreciated
eproduction cost new, termed present value, and in

clusion in the per diem rate of interest charges reflecting a rate of 6 per cent. * * * Inclusion in the per diem rate of an interest charge of 6 per cent on average present value of freight cars, freight repair shops, et cetera, does not appear to be excessive, in view of the fact that a portion of the resulting revenue must be paid out as income taxes.

In their brief, the complainants say:

> In connection with the $2.40 rate the General Committee's averaging method produced an interest on value item for freight cars of 43.588 cents, as against 31.516 cents on depreciated ledger value alone. If the General Committee had followed the Commission's decision [1949 report] and used depreciated reproduction value, the amount included in the per diem computation for interest on freight car value would have been 55.660 cents, and the current rate would be substantially in excess of $2.40.

The "averaging method" above mentioned produced an investment base which was the average of depreciated cost of reproduction and depreciated ledger value. To this base a 6-per cent rate of return was applied. The theory followed in determining this base is essentially the same as that of "fair value", which flourished about 25 years ago. In the *Hope* case and others the Supreme Court pointed out that there are various permissible ways in which any rate base on which the return is computed may be arrived at, and that the result reached rather than the method employed is controlling.

The choice of a percentage figure to be applied to the investment base is a point of much controversy. Although all of the defendants take substantially the same position as the Boston & Maine, which asserts that "it would be improper to include anything in the rent base beyond the costs of financing such property—in this instance the interest burden upon a car owner arising out of his acquisition and ownership of a freight car," the only ones making definite recommendations as to a rate of return are the New Haven, the Boston & Maine, and the Susquehanna. The first-named suggests 6 per cent based on ledger value, while the latter two carriers contend that the basis used should be about 4.6 per cent of that value. The latter figure is the result of an averaging process, reflecting, among other things, the average interest rate of 2.39 per cent on outstanding equipment-trust obligations. The complainants stress "risk of ownership" and "burden of replacement" incurred by the car-owning carriers, and hint at the danger to the national economy if railroads which have heretofore been willing to sink capital in freight cars should decide that in view of high replacement costs, prudence no longer permitted them to contribute their part to the national car fleet, but that they should become car renters rather than car owners.

An intervener, The Chesapeake and Ohio Railway Company, which owns a large number of cars and is consequently one of the principal per diem credit railroads, is more specific. It states:

> If the railroads in general, and the Chesapeake and Ohio in particular, are to own the number of cars required by the national economy, the per diem rate must provide adequate compensation after income taxes. If the per diem rate provided a realistic rate of return after income taxes, the railroads, including the Chesapeake and Ohio, would own a larger number of cars and could, in fact, justify increasing rather than reducing their car ownership.

This intervener, therefore, believes that, far from being reduced, the prevailing per diem rate of $2.40 per car per day is at least 97 cents too low and should be increased. The further expansion of the 97-cent figure which it suggests would be accomplished by adjustment of the car-day divisor to be discussed later.

Argument over investment base and percentage rate of return should not obscure the practical point involved, which is the number of dollars available by way of rental to a carrier which makes an investment in freight cars for joint use in nationwide transportation service. It seems clear that the car-owning carrier is entitled to a return larger than one based solely on cost of money measured by current interest rates, for in acquiring cars it acts somewhat as an entrepreneur. It must assume the burden of planning and financing the new equipment in the light of an uncertain demand for cars in general or those of a particular size and type due to unpredictable factors affecting the outlook for rail transportation. In other words, in determining a fair per diem charge some consideration

should be given to what are termed incentive and risk, and an appropriate place for such an element is in the capital charge.

In our 1949 report we stated that an interest charge of 6 per cent of present value of freight cars did not appear to be excessive. We adhere to that view on the instant record.

The car-day divisor.—For reasons which are well-known, it is generally agreed that surplus and unserviceable cars should be excluded in computing average costs per car-day. However, since per diem charges are established for future application, the extent of that exclusion necessarily rests upon an estimate as to the aggregate number of freight cars which the railroads will own in an indefinite future period, the number which will be unserviceable, and the number which will be idle because of insufficient traffic for their full utilization. The last element, which is closely related to fluctuations in the business cycle, is particularly speculative. In the past, average figures for various periods of years have been used in determining the car-day divisor, but other plans have also been considered. After discussing some of those plans at page 389 of our 1949 report, we said:

> The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10, or 15 years.

It does not appear that theretofore the railroads had ever considered using a period as long as 20 years for this

purpose. In the studies upon which the charge of $1.50 approved in our 1949 decision was based, a 10-year period, 1936 to 1945, was used, and the ratio so arrived at was 86.15 per cent. The 20-year period suggested in the 1949 report covered 1927 to 1946, and produced a ratio of 80 per cent. In the studies which led to the $1.75 charge a period of 15 years, 1934 to 1948, was used to arrive at a ratio of 86.12 per cent. Originally, in the next studies relating to the $2 charge, a 15-year period, 1936 to 1950, was used, and the resulting ratio was 89.13 per cent. However, the General Committee considered it advisable to use the 20 years, 1931 to 1950, and thereby reduce the ratio to 82.75 per cent, incidentally increasing the estimated cost by about 15 cents a day. In the studies on which the present charge was based, a 20-year period, 1933 to 1952, was used, giving a ratio of 86.05 per cent.

In contrast to the foregoing ratios of 86.12, 82.75, and 86.05 are the following actual ratios for the years shown:

Year	*Per cent*
1949	90.39
1950	91.34
1951	94.27
1952	93.59

From 1933 to and including 1940, the average annual ownership of cars by class I railroads was 1,806,065. Because of depressed industrial activity, there were large numbers of surplus cars, and the percentage of unserviceability ranged from 8.8 to 15. The car-utilization ratio

consequently ranged from 63.98 per cent in 1933 to 84.16 per cent in 1940. From 1941 to 1952, inclusive, the class I railroads' annual ownership of cars averaged 1,738,696. Because of the greater average capacity of the cars, increased train speeds, and other means of greater efficiency, including a reduction in the percentage of unserviceability, which ranged from 2.7 to 6.9 per cent, those carriers were able to carry the heavy traffic of the war and post-war periods. Car surpluses after 1940 were negligible in comparison with those of the earlier period.[3] The car-utilization ratio, therefore, between 1941 and 1952 ranged from 90.39 to 96.67. In 1952, the latest year for which figures are of record, the ratio was 93.59. The average for the 5 years, 1948 to 1952, was 92.82, and the average for the 15-year period up to and including 1952 was 91.05 per cent. Taking note of the decline in railroad traffic in 1953 and 1954, the examiner in his proposed report suggested the use of a ratio of 90 per cent as representative of current conditions, subject to verification by actual figures for those years. The complainants in their exceptions do not question the accuracy of the 90-per cent ratio, although they contend that it would be more reasonable to apply a ratio of 86 per cent.

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[3] Complainants show that maximum freight-car surpluses in 1933 to 1940 ranged from 190,370 on March 14, 1940 to 691,587 on January 31, 1933. Minimum surpluses in the same period ranged from 64,299 on October 14, 1939 to 385,137 on October 31, 1933. In the period 1941 to 1952, maximum surpluses ranged from 23,416 on October 20, 1945 to 207,627 on November 5, 1949, and minimum surpluses from 673 on October 23, 1948 to 38,511 on October 4, 1941.

Upon consideration of the matter of the car-day divisor in the light of present evidence, we affirm the finding in the 1949 report that a 20-year period would produce more accurate results than a shorter period. The record does not afford a 20-year experience of car use prior to 1948; accordingly, a 15-year period will be used up to and including that year. We conclude that, for the purpose of determining the compensatory character of the respective per diem charges here under investigation, the reasonable car-day divisors to be used are 86.12 per cent for the 15-year period 1934 to 1948, 82.75 per cent for the 20-year period 1931 to 1950, and 86.05 per cent for the 20-year period 1933 to 1952.

Conclusions.—In accordance with the foregoing views, the figures submitted by the complainants have been adjusted or modified in the following respects: (1) The items representing freight-car repairs and the allocations based thereon are treated in the same manner as corresponding items were treated in the 1949 report, which eliminates certain costs incurred by car-users covering inspection of foreign cars not charged back to the car-owners; (2) depreciation for freight cars is based on undepreciated reproduction value; (3) depreciation for fixed facilities, such as shops, enginehouses, and power plants, a relatively minor item, is based on undepreciated ledger value; (4) return on investment in freight cars, shops, enginehouses, power plants, et cetera, is based on 6 per cent of depreciated reproduction value; and (5) the car-day divisor is based on car-utilization ratios for the respective periods as above noted. The figures as so modified are as follows:

Estimated Average Costs Per Active Car-day

	1948	1950	1952
	Cents	*Cents*	*Cents*
Cost of freight-car repairs	73.131	80.591	92.591
Deadhead haulage of freight-car repair material	2.117	2.315	2.664
Charges to depreciation of freight cars	43.865	51.379	53.452
Charges account of maintenance and depreciation of shops	6.297	5.942	6.467
Miscellaneous maintenance of equipment accounts	4.901	5.962	6.986
Allocated proportion of general expense	3.339	3.891	4.691
Interest on freight-car value	41.946	50.292	55.508
Interest on value of repair shops	4.093	4.228	4.651
Interest on investment in stock of freight-car repair material	0.524	0.573	0.659
Interest on working capital	0.494	0.545	0.632
Cost of certain taxes	11.369	12.708	13.916
Totals	192.076	218.426	242.217

Additional labor, material, and payroll taxes to reflect increased cost levels as of May 1, 1949, and wages as of January 1, 1949	5.179		
Same as of April 1, 1951		13.134	
Same as of April 1, 1953			1.899
	197.255	231.56	244.116

Car ownership adjusted to car-utilization ratios:

86.12 per cent (1948)—558,428,160 car-days
82.75 per cent (1950)—531,677,250 car-days
86.05 per cent (1952)—559,599,360 car-days

No issue is presented as to the propriety of the charge of $1.75 before April 1, 1951, when the Susquehanna refused to continue the payment of that charge. The table above shows a cost of $2.31 as of that date, and therefore indicates that the charges of $1.75 from that date to April 30, 1952, was not in excess of reasonable compensation. The same conclusion as to the $2 charge in effect for the greater part of 1952 and 1953 is supported by the showing of an average cost of at least $2.42 in those years. The present charge of $2.40, in effect since July 31, 1953, is slightly lower than the cost of approximately $2.44 shown in the table as of April 1, 1953, and we conclude therefore that a charge of $2.40 under present conditions is reasonable compensation.

The Susquehanna in its requested findings suggests that there is a "zone of reasonableness" for per diem charges sufficiently wide to include the amounts for which it seeks approval as not "unjust or unreasonably low or noncompensatory for the periods of their effectiveness, and * * * within the zone of reasonableness." By Section 1(14)(a) we are authorized "to establish * * * the compensation to be paid" as car rental. This wording does not indicate that the authority may be exercised merely by defining the upper or lower limits of a zone of reasonableness, as is usually permitted in respect of transportation rates payable by shippers.

Consequently, our finding below specifies the per diem charges which, on the basis of the facts and circumstances before us, could properly be established under section 1 (14)(a). It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past.

We find and declare that the per diem charges of $1.75, $2, and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use.

An order discontinuing this proceeding will be entered.

COMMISSIONER ALLDREDGE did not participate in the disposition of this proceeding.

APPENDIX

Interveners in support of Complainants—The Chesapeake and Ohio Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Delaware and Hudson Railroad Corporation; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Louisville and Nashville Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Northern Pacific Railway Company; The Pittsburgh & Shawmut Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Texas and New Orleans Railroad Company; Western Maryland Railway Company.

Interveners in support of Defendants—The Ahnapee and Western Railway Company; Alexander Railroad Company; The Atlantic and Danville Railway Company; Bamberger Railroad Company; Bath and Hammondsport Railroad Company; Beaufort and Morehead Railroad Company (A. T. Leary, Lessee); Belfast and Moosehead Lake Railroad Company; Butte, Anaconda & Pacific Railway Company; Charles City Western Railway Company; Chattahoochee Valley Railway Company; Chesapeake Western Railway; Chicago, West Pullman & Southern Railroad Company; City of Prineville Railway; Craig Mountain Railway Company; Detroit and Mackinac Railway Company; Escanaba and Lake Superior Railroad Company; Flemingsburg and Northern Railroad Company; Fort Dodge, Des Moines &

Southern Railway Company; Genesee and Wyoming Railroad Company; Georgia, Ashburn, Sylvester & Camilla Railway Company; The Georgia Northern Railway Company; Hampton & Branchville Railroad Company; High Point, Thomasville & Denton Railroad Company; Howard Terminal Railway; Jerseyville and Eastern Railroad Company; Kentucky & Tennessee Railway; Lackawanna and Wyoming Valley Railroad Company (E. McLain Watters, Trustee); Lake Erie, Franklin & Clarion Railroad Company; Lakeland Railway; Live Oak, Perry & Gulf Railroad Company; Maryland and Pennsylvania Railroad Company; Minneapolis, Northfield and Southern Railway; Morehead and North Fork Railroad Company; The Narragansett Pier Railroad Company, Inc.; Nelson & Albemarle Railway Company; Norwood & St. Lawrence Railroad Company; Oregon & Northwestern Railroad Co.; Oregon Pacific and Eastern Railway Company; Paris and Mt. Pleasant Railroad Co.; Pearl River Valley Railroad Company; Rahway Valley Company (Rahway Valley Company, Lessee); Roscoe, Snyder and Pacific Railway Company; St. Marys Railroad Company; San. Francisco and Napa Valley Railroad; The San Luis Central Railroad Company; Santa Maria Valley Railroad Company; Savannah & Atlanta Railway Company; The South Georgia Railway Company; Tennessee, Alabama & Georgia Railway Company; Trona Railway Company; Ventura County Railway Company; Virginia Blue Ridge Railway; Washington and Old Dominion Railroad; Washington, Idaho & Montana Railway Company.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action

No. 56-1004-M

BOSTON & MAINE RAILROAD, ET AL

vs.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

BEFORE WOODBURY, Circuit Judge, and WYZANSKI AND McCARTHY, District Judges, by designation of Chief Judge MAGRUDER pursuant to Title 28 U.S.C. §2284.

OPINION OF THE COURT

April 28, 1958

WOODBURY, Circuit Judge. This is a controversy, in the main between the long-haul trunk line railroads and the short-haul terminal railroads, over the price a railroad ought to pay for the use on its lines of freight cars owned by another railroad.

The question of car hire is not novel. To understand its present aspects a little history will prove helpful.

In the early days of railroading in this country no railroad allowed its freight cars to leave its rails. Through freight to be transported over more than one line was un-

loaded and reloaded at junction points. With the development of more efficient transportation methods following the Civil War this wasteful and time-consuming practice of transferring cargo was gradually abandoned and for a charge the railroads began to permit their loaded cars to move off their tracks on to the tracks of connecting carriers.[1] At first the compensation to the car-owning road was fixed by the railroads on the basis of the mileage travelled by the cars of one road over the tracks of another. This basis for compensation, however, proved unsatisfactory largely for two reasons; the car-owning road had no means of verifying the mileage travelled by each of its cars over other lines and it provided no incentive to the using road for the prompt handling and early return of cars to their owners.[2]

As a solution the American Railway Association about the turn of the century, after years of study and investigation, established as the basis for compensation a flat sum per day for car use, regardless of the type or age of the car involved or the distance it travelled over the user's line. The *per diem* rate for use, known simply as the *per diem,* was gradually increased by the railroads over the years until it reached a point in the early 1950's at which the short-haul, terminating, and predominantly car-using railroads rebelled. This brings us to the present controversy and its background.

Except for one abortive attempt by the Interstate Commerce Commission, see *Palmer* v. *United States,* 75 F. Supp. 63 (1947), the *per diem* rate has always been set by the railroads themselves acting in recent years through

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[1] In 1911 car interchange was made obligatory.

[2] For a more detailed history see *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 90 *et seq.* (1931), and Stone, J., dissenting, at page 101 *et seq.*

their organization, the Association of American Railroads, known as the AAR. An agreement, known as Agreement No. 7, was drafted by the AAR setting up the procedures to be followed by it in fixing *per diem* rates and this agreement was signed by a majority of the railroads.[3] Acting according to the procedures outlined in the agreement, *per diem* rates were fixed at $1.50 as of September 1, 1947; $1.75 as of November 1, 1949; $2.00 as of May 1, 1952; and $2.40 as of August 1, 1953.

At first the railroads generally, signers and non-signers of the agreement alike, settled with one another at the rates established thereunder. In March, 1951, however, the New York, Susquehanna & Western Railroad (Susquehanna hereinafter), which was not a party to the agreement, served notice that after April 1 it would no longer pay the $1.75 rate then in effect, but offered to settle its *per diem* debit balances thereafter on a graduated scale ranging from $1.20 to $2.00 depending on the age of the cars it used. It later offered to increase its scale to a range of from $1.33 to $2.21 but its offers were not accepted and in consequence it become embroiled in a number of law suits. In June, 1953, the Boston & Maine Railroad and the New York, New Haven and Hartford Railroad Company withdrew from the agreement and gave notice of their refusal to pay the $2.40 rate and also even the earlier $2.00 rate after July 31, 1954 [*sic*—actually 1953] the Boston & Maine offering to pay on either a graduated basis or at a flat rate of $1.72 per day. Several other railroads took similar courses and the present proceeding ensued.

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[3] The Agreement provided for rights of withdrawal and independent action by the signatory railroads, and the Commission, acting under §5a(2) of the Act, approved it as in compliance with §5a(6) and therefore valid in spite of the Anti-Trust Laws. *Association of American Railroads—Agreement*, 277 I. C. C. 413. Reopened and reconsidered *Ahnapee & W. R. Co.* v. *Akron & B. R. R. Co.*, ICC Docket No. 31774, decided March 7, 1957.

It started with a complaint filed with the Interstate Commerce Commission by 19 of the larger class I railroads, against five other class I railroads, all of them short-haul roads like the Boston & Maine, the New Haven, and the Susquehanna, and six short-line roads in classes II and III, such as the Barre and Chelsea, the St. Johnsbury & Lamoille County and the New Jersey and New York Railway Company (Horace Banta, Trustee). Fifteen class I railroads intervened on behalf of the complainants and fifty-six railroads, for the most part in classes II and III, intervened on behalf of the respondents.

The complainants disclaimed any intention to invoke the specific power conferred on the Commission by §1(14)(a) of the Act which authorizes it "to establish reasonable rules, regulations and practices with respect * * * to the compensation to be paid * * * for the use of any * * * car * * * not owned by the carrier using it * * *." Instead, alleging that charges less than those fixed under Agreement No. 7 would be unjust, unreasonable and non-compensatory, and that the respondents' actions in offering to pay at other than the uniform *per diem* rate established therein, had been, were and would be disruptive of the "uniform national basis" for handling *per diem* which the Commission had deemed necessary in the public interest, the complainants asked that:

> "the Commission find and declare that the per diem rates of $1.75 and $2, during the periods in which these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that

the Commission grant such other and further relief as may be required in the premises."

The defendants answered, in general challenging the *per diem* rates established under the agreement as excessive and asserting that their offers of settlement were fair, just reasonable and compensatory. In addition some of them challenged the jurisdiction of the Commission to entertain the complaint. The matter came on for hearing before a trial examiner and he, upon full presentation, filed a proposed report wherein after considering the evidence and arguments in detail he concluded that "The Commission should find and declare that the *per diem* charges of $1.75 and $2.00 were reasonable during the periods in which they were effective and that a reasonable charge for present use would be $2.10." He accordingly recommended the entry of a declaratory order to that effect.

On exceptions the full Commission reached conclusions differing in part from those reached by the trial examiner. It found on its analysis of the evidence and the arguments that the *per diem* rates as fixed in the agreement were fair and reasonable. It said that "on the basis of the facts and circumstances before us" the *per diem* charges specified in the agreement were such as "could properly be established under section 1(14)(a)" of the Act and that: "It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past." Wherefore, it said: "We find and declare that the *per diem* charges of $1.75, $2.00 and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use," and it entered an order discontinuing the

proceeding.[4] *Chicago, Burlington & Quincy Railroad Co.* v. *New York, Susquehanna & Western Railroad Co.*, 297 I. C. C. 291 (1955), reconsideration and rehearing etc. denied, July 16, 1956.

At the outset of our consideration of this action brought by a number of terminal short-haul railroads under Title 28 U.S.C. §1336 to enjoin, set aside and annul the above order of the Interstate Commerce Commission, we are faced with the question of its jurisdiction. The assertion is, broadly stated, that the only jurisdiction conferred by Congress on the Commission in the premises is that embodied in §1(14)(a) giving it power to "establish reasonable rules, regulations, and practices with respect to car service * * * including the compensation to be paid" by one railroad for the use of the cars of another, and that, since this jurisdiction was neither invoked nor exercised, it must follow that the Commission does not have authority to enter a declaratory order as to past or even present rates. We do not agree.

Section 5(d) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. §1004(d) provides that within its jurisdiction any agency "is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." There can be no doubt that the railroads involved are subject to the jurisdiction of the Commission, nor can there be any doubt that a "controversy"

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[4] We have little doubt that the Commission's order is subject to judicial review under the rule of *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956), for the practical impact of the order is to require the respondent carriers, and, indeed, as a practical matter all others, to pay the charges for car-use found to be reasonably compensatory at the risk of the imposition of sanctions for violating §1(11) of the Act to be considered presently.

exists between them with respect to car-hire. The question is whether the subject matter of their controversy is within the jurisdiction of the Commission. We think that it is.

Certainly the Commission could if it chose, after notice, embark under §1(14)(a) of the Act upon a full scale investigation and as a result establish by reasonable rules or regulations future practices with respect to car service, including the compensation to be paid by one railroad for the use of freight cars owned by another railroad. But it was not asked to do this and it has disclaimed any intention to do so.

Section 1(14)(a), however, is not the only section of the Act conferring regulatory powers on the Commission with respect to the use by one railroad of another's cars. Section 1(10) defines "car service" to include the "use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property * * * by any carrier by railroad subject to this chapter," and subsection (11) provides:

> "It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful."

In addition to the criminal sanctions imposed by §10 of the Act, §8 provides that in the event that any common carrier by railroad subject to the Act shall do, or cause or permit to be done, any act, matter or thing "prohibited or declared to be unlawful" it "shall be liable

to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation," together with a reasonable counsel fee. And §9, gives persons claiming damages under §8 the election of proceeding in a court of competent jurisdiction or else making a "complaint to the Commission as hereinafter provided." Section 13(1) of the Act provides for the filing with the Commission of complaints against carriers for violations of the Act and §16(1) provides:

> "If, after hearing on a complaint made as provided in §13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

It is true that compensation for the use of cars is not specifically included in the definition of "car service" in subsection 10, whereas §1(14)(a) in giving the Commission power to "establish reasonable rules, regulations and practices with respect to car service" goes on to state "including the compensation to be paid * * * for the use of any * * * car or other vehicle not owned by the carrier using it * * *." It is asserted that the provisions being in some respects in *pari materia* the specific inclusion of compensation for use in §1(14)(a) indicates clearly that the omission of any mention of compensation in defining car service in subsection 10 could not have been inadvertent with the result that Congress must have intended in subsection 11 to impose no duty on the railroads to establish, observe and enforce just and reasonable *per diem* charges. We do not find the argument persuasive.

Car service is broadly defined in subsection (10) to include the "use" and "interchange" of cars, and historically and also very naturally, compensation has always been incidental to and an integral part of the "interchange" of cars between railroads and the "use" of the cars of one railroad by another. Moreover, to construe compensation as outside the ambit of the meaning of "use" or "interchange" as used in subsection (10) would leave the railroads free to make whatever "unjust" or "unreasonable" rules, regulations or practices they might choose with respect to compensation for car use without running afoul of subsection (11). It is hard for us to assume that Congress could have intended any such thing. On the contrary, we think it far more likely that Congress intended to give a right of action for damages to any one suffering loss from an excessive rate of hire for the use of cars.

Our conclusion therefore is that §1(11) reasonably construed imposes a duty upon the railroads to charge no more than reasonable compensation for the use of their cars by other railroads, that §13(1) empowers the Commission to entertain complaints alleging excessive charges for car hire, and that §16 gives the Commission authority to enter orders awarding damages to those harmed by excessive car hire charges. Thus, since the Commission has jurisdiction to enter an order awarding damages for past or present unreasonable charges for car hire, it has jurisdiction under §5(d) of the Administrative Procedure Act in its discretion to enter a declaratory order with respect to the reasonableness of such charges.

We turn now to the merits.

The trunk line long-haul railroads, serving as they do the relatively sparsely settled and predominantly producing areas of the country, originate more traffic than

they terminate. The short-haul railroads serving the coastal ports and the relatively more heavily populated and predominantly manufacturing areas, on the contrary, terminate more traffic than they originate. Thus, since a railroad must provide cars enough to handle the freight originating on its lines, the freight car equipment of the country is for the most part owned by the trunk line railroads and that owned by the short-haul lines is almost a negligible proportion of the whole. See *Chicago R. I. & P. R. Co.* v. *United States*, 284 U. S. 80, 93, 95 (1931). This situation does not exist because of default by the short lines. Having more cars coming in from other lines to unload than they have cars to load and send back, they naturally, to avoid back hauling empty cars, prefer to load and return foreign cars instead of loading their own cars for dispatch off their lines. And this practice has the sanction of Car Service Rule 1, see *Car Service, Freight Cars*, 268 I. C. C. 687, which provides:

> "Home cars shall not be used for [the] movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable."

From the fact that railroads first load off-line freight on available foreign line cars, it is obvious that if a short-line predominantly freight-terminating road owns many cars it will have a surplus which must perforce remain wastefully idle on its sidings awaiting an overflow of traffic, if any. Thus the trunk lines, as owners, for the most part furnish the freight car equipment used by the short lines and the short line traffic-terminating roads are perforce *per diem* debit roads, interested in a low *per diem* rate, whereas the long-haul predominantly traffic-originating roads are *per diem* credit roads interested in a high *per diem* rate. The present controversy stems from this conflict of interest.

The short line roads contend that under Agreement 7 mentioned above the trunk lines through their voting power (under the agreement *per diem* rate increases are authorized by vote of the signatory railroads, each road casting one vote for each freight car that it owns) have raised the *per diem* rate to a more than compensatory level, and they charge the Commission with error in putting its stamp of approval on the rate increases established under the agreement.

There is not and cannot be any question that every railroad is entitled to be paid fair and just compensation for the use of its freight cars by another road. Nor can there be any question that from the car owner's point of view *per diem* is by and large and on the whole a fair enough method for calculating the compensation to which it is entitled. The question is whether *per diem*, which takes account only of the time factor and leaves out altogether the use factor, that is distance travelled on the user's line, is a fair method of determining compensation from the car user's point of view. And, if this question be answered in the affirmative and *per diem* be approved as the fairest practical method for calculating compensation from both points of view, the question then arises whether the Commission erred in its calculation of the fair *per diem* rate. We shall consider the question last stated first.

It has long been generally recognized that car hire, however established, should be enough reasonably to compensate the car owner for its costs of ownership and no more, and with this in mind that the *per diem* charge should be enough, but no more than enough, to cover the cost to the car owner of 1) repairs, 2) taxes, 3) depreciation, 4) interest on investment, and 5) miscellaneous expenses of ownership. Obviously therefore the determination of the *per diem* rate poses a complicated

question of railroad cost accounting committed by law to the Commission as a matter peculiarly within its expert competence. We therefore approach our analysis of the Commission's computations with due deference.

Detailed analysis of the Commission's computations with respect to each one of the items of car ownership expense listed above is not necessary for present purposes. We shall consider but two of them, repairs and depreciation, and the so-called "car day divisor" by which annual costs of freight car ownership are divided to reach the cost per day.

The item for repairs, the largest single component of the *per diem* charge, was calculated by the Commission largely on the basis of an account required by the Commission to be kept by all railroads known as Account 314, Freight Train Cars—Repairs. This account is of a comprehensive nature including the cost of repairs to cabooses and refrigerator cars not covered by *per diem,* and a number of other costs and expenses not directly related to the use of foreign cars. The Commission made allowances for some of these irrelevant costs included in the account but it rejected the suggestion that the account be broken down by the railroads to reflect more accurately the actual annual cost of maintaining a freight car. Such a break down of the account was recommended by the Subcommittee on Mileage and Per Diem of the AAR, which was charged with the specific, duty of fixing *per diem* under Agreement No. 7, but the General Committee of the AAR having final say on *per diem* rejected the recommendation. There was persuasive evidence that a break down of the account was practical, indeed, that some railroads at little accounting cost were already doing so for their own information. Nevertheless the Commission said:

> "The recommendation of the Subcommittee deserves further consideration. However, it is not

desirable to delay the decision of this case pending an effort to provide additional data bearing on car repairs."

Perhaps it is within the Commission's competence to reject the recommendation in the interest of expedition. But we do think it should not have done so without a more thorough investigation and more detailed findings and analysis. If the recommendation deserved consideration it should have been considered, for there was ample evidence introduced to show the value of a break down of the account in reaching an accurate computation of *per diem* and also to show that such a break down was not impractical.

Depreciation, the second largest element of the *per diem* charge, was calculated by the trial examiner on the basis of the undepreciated ledger value, that is the cost, of the freight car equipment in use which he said was "in accordance with the generally accepted accounting theory." The Commission, however, disagreed. It held that the basis should be "undepreciated reproduction value." We think that this holding is open to very serious question.

The Commission said that it realized that the prevailing accounting practice in determining depreciation was to use ledger value. But it said that it was "not here concerned with the propriety of that practice," because it was engaged in determining the just and reasonable *per diem* rates in effect at the present and during the relevant periods in the past, and in reaching that determination it would be less than realistic if it failed to take into consideration "that carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values."

If depreciation is an element, and not a minor one, of the *per diem* charge, we fail to see why accepted account-

ing practices for determining depreciation should be tossed aside as irrelevant. Moreover, as the trial examiner pointed out, ledger value is a known figure whereas the cost of reproduction can at best only be estimated and the process is inherently difficult because it involves many assumptions which are at least open to question. Furthermore, there is persuasive evidence that with ever faster freight trains and ever more efficient use of cars, present freight car requirements are met with fewer cars than were formerly needed with the result that in all probability many cars now in use will never actually be replaced so that on the Commission's basis car users in paying *per diem* will in part be compensating car owners for expenses they will never incur.

We turn now to the "car day divisor" by which the Commission determined the average cost per day of car ownership.

It appears to be generally agreed that surplus or unserviceable cars should not be included in computing the average daily cost of owning a freight car. The question therefore is to determine the average number of days per year that freight cars are in active use, that is to say, either in active use on the line of the owner, or else on a foreign line, whether in active use thereon, or laid up for repairs, or standing idle. Since no car is in active use all the time an adjustment is necessary to spread the actual annual cost of ownership over the shorter period when the car is in active use. This is accomplished by means of a car-utilization ratio which is, simply, the ratio which the average number of days a freight car is in active use bears to 365, the number of days in the year.

Since all the freight cars in the fleet are not in active use all the time, the utilization ratio is always less than 100 per cent. The effect of the ratio, therefore, is to in-

crease the *per diem* charge over what it would be if all cars were in use all the time and consequently the lower the ratio the higher the *per diem* charge. That is, a ratio of say 75% would lead to a higher *per diem* charge than a ratio of say 90%.

The Commission, to determine the appropriate car utilization ratio for calculating *per diem,* averaged actual car utilization over the past twenty years. This period included several of the depression years of the 1930's when many freight cars lay idle for want of traffic and consequently use of the twenty-year period produced a lower ratio, and a higher *per diem,* then would have been the case had a shorter period been used.

The plaintiffs argue strenuously and persuasively for the use of a shorter period than twenty years in computing average freight car utilization. We would find it difficult, however, in view of the nature of the question and the Commission's expertness in the field, to say that the Commission committed error of law in using the twenty-year period. But the Commission reached its conclusion in part upon an earlier decision, *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.,* 274 I.C.C. 383 (1949), from which it quoted, wherein it had said at page 389: "The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10 or 15 years." We think the Commission erred insofar as it considered car-age a factor in computing car-utilization. We agree with the statement of the trial examiner who said in this connection:

> "The mere fact that freight cars have an average life of about 20 years affords little or no ground for assuming that their probable utilization in any given future year will be the same as that for the average

of the past 20 years. There is no reason to believe that economic cycles are so marked."

The foregoing discussion is more by way of warning to the Commission for its future guidance than a statement of the grounds for our decision annulling and setting aside the order of the Commission. Basically and fundamentally we ground the result which we reach upon the inadequacy of the Commission's consideration of the first question stated earlier in this opinion.

Per diem, as Mr. Justice Stone pointed out in his dissent in *Chicago R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 112 (1931), "is admittedly but a rule of thumb." We are not fully persuaded, however, as Mr. Justice Stone suggested, that it is nonetheless "the best which experience has devised to meet all the complex requirements growing out of the average car-hire situation." The *per diem* method may work out well enough on the average over a period of years to provide the railroads as car owners with fair compensation for the use of their cars. But there is another side of the coin, and that is the fairness of the method to the railroads as car users.

The short-haul, terminating and predominantly freight car-using railroads, by the very nature of their operation, move freight cars relatively short distances over their lines. And, as the Commission pointed out, "The average detention per car in their terminals is high." Thus on these roads, because of their short-haul terminating nature, the average freight car is subjected to relatively little mileage, and, on the other hand, is necessarily detained for unloading, and if traffic permits reloading, for a relatively long period of time in relation to its total mileage movement. On the basis of these considerations, supplemented by evidence that a study conducted in 1948 by the Engineering Section of the Commission's Bureau

of Valuation disclosed that 70% of the cost of freight car repairs and 45% of the cost of freight car depreciation are directly attributable to the mileage to which a car is subjected as distinguished from the passage of time alone, the plaintiffs strenuously argue for a method of calculating car-hire which will include a mileage factor in addition to a time factor. They do not suggest going back to the early method of calculating car hire solely on the basis of the mileage travelled by each foreign car on a user's line. Nor do they suggest any sort of pure mileage basis for calculating car-hire, such, for instance, as a rate calculated only on the average mileage travelled by freight cars on a user's line.

Their suggestion is that a fixed mileage factor be determined for each road based upon the average distance in miles which freight cars move per day on its lines, which it is said can easily be determined from statistics kept by the railroads and will need to be revised only when there is a substantial change in a railroad's freight traffic pattern, and that this use factor be used in conjunction with a uniform time factor for all railroads to produce a rate of car-hire to all railroads, both short and long-haul.

Basically this time-mileage plan involves a separation of the national aggregate car ownership cost into two categories, one consisting of that proporation of the aggregate cost directly attributable to mileage use and the other consisting of the remainder which is treated as attributable to the passage of time. Thus under the plan the *per diem* car-hire charge for a particular road is a composite figure consisting of the sum of that particular road's mileage component and the uniform national average unit cost per day attributable to time alone. It is said that the function, and the virtue, of this plan is to reallocate the aggregate ownership costs among the using

railroads directly in proportion to the actual use, *i.e.* the wear and tear, incurred by cars used on each road.

The Commission gave the plan only cursory consideration. After stating its general features it said that the determination of a separate mileage use rate could not be made from the evidence before it in the case, and moreover that "it [such determination] would involve a long and complicated statistical undertaking."[5] It then added: "If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling *per diem* accounts." Following this it briefly discussed a plan proposed by the Boston & Maine Railroad for determining a *per diem* rate based on the average age of the freight car fleet of the car-owning road, a plan no longer advocated which we need not consider, and then it said, referring to both plans:

> "As above indicated, the suggested plans for varying *per diem* charges could not be put into effect without an extensive investigation either by this Commission or by the AAR. The facts and arguments here presented are not persuasive that plans of this kind are desirable."

We do not say, for it is not our function to say, that the time-mileage plan proposed is fair and practical and ought to be adopted. What we do say is that the plan deserves more than the cursory consideration given to it by the Commission, for without more detailed findings by it we cannot exercise our judicial function.

It is true that straight *per diem* has been the basis of settlement for freight car use for over fifty years. But

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[5] There is little or no specific support for this general statement in the record considered as a whole.

that does not render the straight per diem method sacrosanct. The suggested time-mileage plan on its face seems to have much to recommend it for it combines use with the passage of time as the basis for figuring a rate for car hire, and this certainly seems fairer to the short-haul terminating lines. If the evidence in this case is not sufficient to permit determination of an actual mileage use rate, the Commission can take further evidence or turn the matter over to its accounting staff for investigation and analysis. In advance of a more thorough study we do not see the basis for the Commission's broad conclusion that the plan is both impractical and undesirable. To perform our function in the face of the persuasive evidence that the plan is both desirable and feasible we must have at least some inkling of the basis for the Commission's general conclusions to the contrary. In short we think the Commission erred in brushing aside a matter of such importance to so many vital links in our transportation system with little more than a casual wave of the hand.

We are not impressed with the argument advanced by some of the plaintiffs that the Commission should have dismissed the complaint for a declaratory judgment filed with it by the trunk line roads on the ground that in bringing it the complainants were acting in furtherance of a conspiracy unlawful under the Sherman Anti-Trust Act. Indeed, we are so little impressed with the argument that we see no need either to specifically refute it or even to state it in detail.

A decree will be prepared setting aside and annulling the order of the Interstate Commerce Commission.

Dissenting Opinion of McCarthy, D. J.

McCarthy, D. J. (Dissenting)

This action stems from a basic dispute between the short-line, freight terminating railroads and the car-owning freight originating railroads as to the per diem charges for each freight car while it is on the tracks of any railroad but the owner. The problem before the three judge court concerns the question of the power of the Interstate Commerce Commission to enter the order in ICC Docket No. 31358, and which is presented for review by this court together with the further question of whether or not the order entered was supported by evidence adduced before the Commission.

It is my conclusion that the Commission was without jurisdiction to enter the order in question; hence, this separate opinion in addition to the learned discussion written by Judge Woodbury.

As has been stated by Judge Woodbury the Interstate Commerce Commission entered an order which in itself clearly indicated that it was not acting under Section 1 (14) (a) of the Interstate Commerce Act. He proceeds, however, and determines that the Commission derives authority elsewhere to enter a declaratory order as to rates. With this determination I cannot agree.

Section 5 (d) of the Administrative Procedure Act authorizes declaratory orders of the sort entered here by the Commission, but this section does not confer jurisdiction. Jurisdiction to enter this order must arise elsewhere. Section 9, Administrative Procedure Act; *Olesen* v. *Standard*, 227 F. 2d 785. Out of deference to the rights of the parties it is the duty of the court to search the Interstate Commerce Act to determine if jurisdiction to enter an order establishing compensation for so-called

per diem charges is granted under the Act separate and apart from Section 1 (14) (a).

Section 1 (4) of the Interstate Commerce Act grants compensation setting power, but this section is limited to through route cases and it is apparent from an examination of the record that the case currently before the three judge court invoves more than "through route" usage and compensation.

Section 1(11) grants rule making power, but it does not refer to compensation as such. This section is analogous to Section 1 (12) which has been interpreted by the Supreme Court in *Chicago, Rock Island and Pacific Railway Co.* v. *United States,* 284 U. S. 80, as not including compensation. The language used in that case at page 99 is conclusive of the entire situation: "That subject [compensation for use of cars], as already appears, is covered by Section 1(14)(a)." This language also negatively answers the suggestion that power to set compensation is impliedly in Section 1(10) or 1(11). Cf. also *Palmer* v. *United States,* 75 Fed. Supp. 63.

It is my considered judgment that, if the Commission has the power to enter an order such as this, without compliance with the requirements of Section 1(14)(a) the will of Congress has been thwarted. The obvious result of this order of the Commission is to grant to the credit balance roads unlimited power to boost per diem rates. Because of the organization of the Association of American Railroads and the voting procedures used in setting per diem rates, the debit balance railroads, under the order entered by the Commission, are the captives of the credit-balance roads and, because of the "car service" rules and the economic facts of railroad life, they cannot buy enough

freight cars to obtain enough votes to control per diem rate setting within the General Committee of the Association of American Railroads.

It may also be noted that the eastern railroads described in this petition have approximately 16,000 freight cars and these roads are all debit car railroads while the large shipping credit car railroads have cars which run into the hundreds of thousands. This becomes important in view of the fact that there is an obligation devolving upon the debit car railroads to use cars owned by the credit car railroads for shipping purposes before they can utilize their own. This is only one viewpoint of the many angles that were thoroughly disregarded by the Interstate Commerce Commission when they disregarded the recommendations of the examiner and accepted "in toto" the rates set by the American Association of Railroads.

Section 1(14) (a) is intended to negative the possibility of the issuance of any order such as we have here—an order which is, in truth, merely a rubber stamp of a decision already made by the stronger of two economic groups. Here, we have an instance of an abandonment of its functions by the Commission altogether in favor of the long-haul trunk line railroads. The Commission in the exercise of its duties has taken the simple way out. Substance has given way to mere form.

Decision that jurisdiction may be found only within the confines of Section 1(14)(a) would obviate the possibility of the Commission surrendering its powers and duties by seeking the easy way.

Congress has spoken only twice as to per diem rates. The first was in Section 1(14)(a) which carries with it the requirement that the Commission conduct an investigation

through its impartial experts. The second was in the Bulwinkle Act which authorized the organization of a private association with the approval of the Commission and which accepted rates set by this private association from the sway of the Sherman Anti-Trust law, but only so long as non-assenters were free to refuse to follow the rates set by the association and to bargain independently. The order before the Court does not set rates in accord with Section 1(14)(a) and the order before the Court does not come within the purview of the Bulwinkle Act, since the effect of the order is to require compliance with the established rates by all railroads, assenters and non-assenters alike.

It should be noted that the Congress has provided for adequate safeguards in each situation. Under Section 1(14)(a) rates may be set only after an impartial investigation conducted by a corps of experts available at all times in the personnel of the Interstate Commerce Commission; under the Bulwinkle Act the non-assenters are free to bargain independently. If the order of the Commission here should be rubber-stamped these safeguards would be lost and the clearest of anti-trust violations by illegal price fixing would be endorsed.

That part of the declaratory order here under review which states that the per diem charges were charges which could have been established under Section 1(14)(a) and that lower charges would not be compensatory is not an escape hatch which this Court can use for the following reasons.

1. The fact that the charges could have been established under Section 1(14)(a) is not enough for the Commission to endorse them. Under that section the Commission could not establish rates retroactively.

2. The fact that the Commission finds that lower rates would not be compensatory is not enough because this finding, if it is such, is not based on the impartial investigation which would have been held had the Commission acted under the said section.

I would therefore vacate the order of the Interstate Commerce Commission because it is without jurisdiction. To arrive at any other conclusion is tantamount to saying that the Commission can close one legislative gap after another. The history of the Act leads only to one conclusion and that is that these gaps cannot be closed except by the Congress of the United States.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 56-1004

BOSTON & MAINE RAILROAD, *et al.*

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION

JUDGMENT

This cause having come on to be heard on the plaintiffs' complaint seeking to enjoin, set aside, and annul a report and order issued by the Interstate Commerce Commission, dated October 17, 1955, (petition for reconsideration, re-argument and further hearing denied July 16, 1956) in a proceeding known as *Chicago, Burlington & Quincy Railroad Company, et al* v. *New York, Susquehanna & Western Railroad Company, et al.*, I. C. C. Docket No. 31358, and the United States of America and the Interstate Commerce Commission having filed answers, and other parties having intervened, and all parties and intervenors being agreed (and the Court having found) that there is no genuine issue as to any material fact, and the Court having heard counsel, and the Court having concluded in an opinion by Judge Woodbury that plaintiffs are entitled to judgment as a matter of law.

Judgment

It is hereby ORDERED, ADJUDGED AND DECREED:

That the order issued by the Interstate Commerce Commission, dated October 17, 1955, is set aside and vacated and the cause is remanded to the Commission for further proceedings not inconsistent with the aforesaid opinion of Judge Woodbury.

That the plaintiffs shall recover their costs of $ in this Court.

Issued at Boston, Massachusetts, this 5th day of May, 1958.

s/ PETER WOODBURY
Judge of the United States Court of Appeals

s/ CHARLES E. WYZANSKI, JR.
Judge of the United States District Court

Judge of the United States District Court